

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT McCONNELL,

Petitioner,

v.

WILLIAM REUBART, *et al.*,

Respondents.

Case No. 3:10-cv-00021-GMN-CSD

ORDER

I. SUMMARY

This action is a petition for writ of habeas corpus by Robert McConnell, a Nevada prisoner sentenced to death. The case is before the Court with respect to a motion to dismiss filed by the respondents and a related motion for evidentiary hearing filed by McConnell. In the motion to dismiss, Respondents assert that certain of McConnell's claims are barred by the statute of limitations, unexhausted and/or procedurally defaulted, and/or not ripe for review. The Court will grant the motion to dismiss in part and deny it in part. The Court will dismiss certain of McConnell's claims, as explained below. The Court will deny McConnell's motion for evidentiary hearing, without prejudice to McConnell making a new motion for an evidentiary hearing in conjunction with the briefing of the merits of his remaining claims, as contemplated in the scheduling order in this action. The Court will set a schedule for the respondents to file an answer.

II. BACKGROUND

The Nevada Supreme Court described the background of this case, as follows, in its opinion on McConnell's direct appeal:

On August 7, 2002, McConnell shot Brian Pierce to death. Pierce lived with and planned to marry April Robinson, McConnell's former girlfriend. McConnell broke into the couple's home while they were at work. When Pierce returned and entered his front door, McConnell shot him repeatedly. Later, when Robinson came home, McConnell threatened

1 her with a knife, handcuffed her, and sexually assaulted her. He then
2 kidnapped her, forcing her to drive to California. Robinson was able to
escape and alerted authorities. McConnell was later arrested in San
Francisco.

3 The State charged McConnell with first-degree murder, alleging
4 theories of deliberate, premeditated murder and of felony murder during
the perpetration of a burglary. The State also charged him with sexual
5 assault and first-degree kidnapping. After the preliminary hearing, the
State filed a Notice of Intent to Seek Death Penalty and alleged three
6 aggravators: the murder was committed during the course of a burglary,
was committed during the course of a robbery, and involved mutilation.
7 Before trial, McConnell successfully moved to represent himself; the
Public Defender served as standby counsel thereafter. McConnell then
8 pleaded guilty, without benefit of a plea agreement, to sexual assault and
first-degree kidnapping; judgment was entered accordingly, and he was
9 sentenced to consecutive terms of life imprisonment with the opportunity
of parole. He also pleaded guilty to first-degree murder, and a penalty
10 hearing before a jury was set.

11 McConnell's penalty hearing began on August 25, 2003, and lasted
four days. In his opening statement, McConnell said that he believed that
12 the evidence would show four mitigating circumstances: he was acting
under extreme emotional distress at the time of the murder; he had
13 accepted responsibility for the crimes by pleading guilty; he had no
significant prior criminal history in the way of violent felonies; and his
14 behavior in custody was good.

15 The evidence at the hearing showed that Robinson met McConnell
in Reno in 2000, and the two began dating. She broke up with him in the
16 spring of 2001 and about eight months later became engaged to Pierce.
Threats were exchanged between the couple and McConnell, and
17 Robinson obtained a temporary protective order against McConnell.
[Footnote omitted.] After breaking up with Robinson, McConnell told
18 another girlfriend, Lisa Rose, that he was going to murder Pierce. Rose
was so concerned that she twice notified the Secret Witness Program and
19 also contacted Robinson. McConnell eventually left the Reno area.

20 About a year later, McConnell returned to the area. On August 4,
2002, he contacted his former roommate, Alejandro Monroy. When the
21 two men met, Monroy noticed that McConnell was still fixated on Robinson
and displayed aggression toward her. Monroy tried to persuade
22 McConnell to let his feelings for Robinson go and to grow up.

23 Three days later, when Robinson came home from work at around
4:30 p.m., she noticed some unusual things. The window blinds were
24 closed, a golf-ball-sized hole was in the outside paneling, and a blanket
was lying in front of the door inside the house. Most unusual of all,
25 however, was that her fiancé, Brian Pierce, did not come outside to greet
her. A few seconds after entering her home, Robinson saw a man dressed
26 in black holding a knife. It took her a moment to realize that the man was
McConnell, whom she had not heard from in months.

27 McConnell told Robinson, "Just shut the fuck up." He grabbed her
28 arm, forced her into the master bedroom, threw her facedown on the bed,
and handcuffed her. He then placed her on a couch and began talking to

1 her. About 20 minutes later, McConnell cut Robinson's shirt and bra off
2 with the knife and took off her pants and panties. Placing her facedown on
3 the bed again, he duct taped her arm to her leg, duct taped her eyes and
4 mouth, and placed a towel over her head. He then sexually assaulted her
5 vaginally, anally, and orally with his finger and penis.

6 Afterwards, McConnell asked Robinson for money, and she gave
7 him seven dollars. Robinson then got dressed, and McConnell told her
8 that if she made any wrong moves he was going to shoot her in front of
9 her neighbors. She saw that he had a gun in a holster with two magazine
10 clips and believed him. She also saw that he had a wallet and car keys
11 that appeared to belong to Pierce. When she asked about Pierce,
12 McConnell told her that Pierce was locked up in a U-Haul, being watched
13 by other people. McConnell said that she would have to take him to
14 California if Pierce was ever going to be set free.

15 Robinson and McConnell drove to California in her car. He told her
16 that everything that was occurring was a part of his plan. She realized that
17 McConnell "had been keeping track of ... when Brian and I went to work,
18 when we got home, the activity at the house, our cars, where they were
19 parked, how many dogs we had, where we sat in the house." As they
20 approached San Francisco, Robinson began suspecting that Pierce was
21 not a hostage and that McConnell was eventually going to kill her. After
22 they stopped at a gas station, she was able to escape in the car. Robinson
23 drove to a nearby hospital and contacted the police in San Mateo,
24 California. She gave the police McConnell's backpack, which contained
25 items such as a 9-millimeter semiautomatic handgun, bullet magazines,
26 and handcuffs.

27 Early the next morning, on August 8, Washoe County Sheriff's
28 Deputies responded to the reported kidnapping and sexual assault and
arrived at Robinson's home. After kicking in the door and entering, the
deputies found Pierce dead. He had suffered several gunshot wounds,
and a knife was stuck in his torso. Underneath the knife was a
videocassette entitled "Fear."

Dr. Christine Elliot, a forensic pathologist, performed an autopsy on
Pierce's body. Pierce had suffered nine gunshot wounds. One gunshot
wound behind his ear "appeared to be very close range or contact in
nature." He had also suffered three stab wounds. Two stab wounds were
the "most superficial," and a knife was still in the third wound. The lack of
bleeding into the stab wounds suggested that they occurred postmortem.
Pierce died from massive blood loss from the gunshot wounds.

Before his arrest, McConnell called his brother, Darren Bakondi,
and asked him to send "money, things of that nature." Bakondi testified
that McConnell was "kind of rambling" during the conversation: "He told
me maybe he should kill himself. Or he said he might go out in a blaze of
glory, maybe make the cops—maybe take a couple of them with him, or
hopefully some kind of shootout or something."

Less than a week after the crimes, McConnell was arrested in San
Francisco. He was extradited back to Nevada. While in custody, he made
a number of drawings, had some recorded telephone conversations, and
wrote a number of letters. These items were admitted as evidence against
him. One item was a letter he wrote to Robinson after she testified at his

1 preliminary hearing. The letter had a cover sheet with "Rest in peace" and
2 "1977–2002" (the years of Pierce's birth and death) written on it. The letter
read in part:

3 I hope this letter finds you before you kill yourself.
4 Just think. Now you can be with your mom and Brian forever.
That was some performance last Thursday. You almost had
me feeling sorry for you.

5 You should thank me, you know. I could get into your
6 house anytime I wanted. Just think. Brian would still be alive
if you had locked that window. How does that really make
7 you feel, April? Late at night, alone, when you cry yourself to
sleep. Yes, it is a nightmare. And it won't end until you finish
8 the job on your arm.

9 The last sentence referred to an earlier attempt by Robinson to commit
suicide. She, however, never received the letter. (Other items admitted
10 into evidence will be discussed below.)

11 At the time of his murder, Pierce was 26 years old, attending
college and studying graphic design. His younger sister, Kristine Pierce,
12 testified that he had many friends. She loved him and looked to him for
guidance. She described Pierce as "a brave person and a real man."
13 Pierce's mother, Pam McCoy, spoke of her pride for her only son and
stated, "He never spoke hurtful words. He was loyal. He was a loving son."

14 Pierce's stepmother, Sheryl Pierce, described Pierce as "a great
kid" who held a Bible study class in his bedroom every week while growing
15 up. She thought of him every day. Mrs. Pierce also described two
telephone calls she received one night at home after the murder. In the
16 first call, when she heard McConnell say his name on her answering
machine, she broke the connection. McConnell called back about a minute
17 later and said on her machine, "Your son died like a coward." Mrs. Pierce
was "absolutely horrified" and "couldn't imagine why anyone would be so
18 cruel and mean as to call someone he doesn't even know just to cause
that kind of pain."

19 McConnell called three witnesses. His longtime best friend, Luis
20 Vasquez, who managed a Reno car dealership, described McConnell as
one of the best car salesmen he ever had. Vasquez took family vacations
21 with McConnell and trusted him to baby-sit his children. Before the crimes,
Vasquez told McConnell to "walk away" from his feelings for Robinson. He
22 described McConnell as being "very, very depressed," and added that
McConnell was crying and, at times, suicidal.

23
24 Misty Tackman, a receptionist at the car dealership where
McConnell had worked, testified that Robinson once cursed at her and
threatened to kill her with a knife.

25
26 Cassandra Gunther, the mother of McConnell's daughter, testified
that she became pregnant in 1999 when she was 19 years old. McConnell
27 pressured her into keeping the child, once threatening her life. Gunther
ended the relationship, the child was born, and Gunther married another
28 man. As Gunther wanted, McConnell had nothing to do with his daughter
after the birth.

1 McConnell testified on his own behalf. He declined to give specific
2 details about his childhood but stated that he and his mother did not get
3 along. He said that he did not want to make excuses for his behavior
4 because many people have bad experiences growing up. He added,
5 "Everything I'm saying now is for the benefit of the Robinson and Pierce
6 family." McConnell testified that initially his relationship with Robinson was
7 great, but after he caught her cheating, things went downhill. She started
8 spending time with Pierce, and McConnell began to get jealous and
9 perceive Pierce as a threat. Threats between McConnell and Pierce were
10 made "back and forth," but Pierce "wouldn't fight."

11 McConnell stated:

12 I attempted to leave town, get away, because there was an
13 instant where I was—I'm going to do something right now.
14 I'm going to kill these people right now....

15

16 I should have got the counseling maybe to deal with some
17 other issues. I never did.

18 And, you know, at some point I just—I don't want to say
19 snap. It wasn't instantaneous, you know. I came back with a
20 plan to murder. I did. When I crossed country, I came back,
21 this is about revenge. I'm going to get these people, Brian,
22 April.... And in my mind the war is on. The words have been
23 said. The threats on both sides. So I am justified in whatever
24 I do because, you know, they shouldn't have messed with
25 me; they shouldn't have talked shit to me.

26 And but then there was the other side where, you know,
27 what the hell are you doing? And I would go back and
28 forth....

29

30 At some point on August 7th I did all the things they said....
31 You know, I was just kind of aimless, wandering around. But
32 all of a sudden I became focused, and I did, and I just made
33 the decision I'm going to do this. I'm going to retaliate
34 against the people that ruined my life.

35 McConnell also said that

36 I can't believe that I killed a Christian.... And to find out that I
37 took the life of a person that goes to church and all this stuff
38 that I find out, it hurts me now.

39 At the time, yeah, very lack of remorse. I was pissed off. I
40 admit to making those phone calls, the drawings on the wall.
41 That was done absolutely, you know, on purpose

42

1 But in—with respect to this murder, ... I'm the coward. I
2 ambushed Brian. He had no chance. Because of perceived
3 threats or whatever, whatever I told myself for justification,
4 you know, I took his life. You know, there's no excuse for
5 that. And I have to answer to everybody.

6 He added, "I am sorry for what I did now. I really am."

7 Under cross-examination, McConnell described Pierce's murder on
8 August 7. He had been watching Robinson's and Pierce's house with
9 binoculars for two days before the murder. The morning of the murder,
10 wearing a police-issue battle dress uniform, he broke into the house
11 through an open window and took such things as bills, pictures, and notes
12 to see what Robinson and Pierce had been doing.

13 McConnell reentered the home at around 12:20 p.m. and waited,
14 determined to kill Pierce when he came home. Once Pierce came in the
15 door, McConnell pointed his gun at him and said, "Give me your wallet."
16 Pierce threw his wallet toward McConnell and reached for the door.
17 McConnell fired his gun ten times. He approached Pierce because he
18 wanted to look into his eyes to see him die. He then dragged Pierce's
19 body into a bedroom and cut into it two or three times to dig out a "Black
20 Talon" bullet to see what one looked like inside a body. McConnell then
21 stuck a knife into Pierce's torso because he was "still mad." He placed the
22 videotape "Fear" that he found at the house on the body as a message for
23 Robinson. He also took credit cards out of Pierce's wallet.

24 McConnell explained that his actions were the result of emotional
25 duress. Because this duress continued even after he was in custody, he
26 boasted of murdering Pierce and took pleasure in making Pierce's family
27 suffer. McConnell said he had since had a change of heart, but he also
28 admitted that violence was still in his nature.

The jury found all three aggravating circumstances, determined that
any mitigating circumstances were insufficient to outweigh the aggravating
circumstances, and returned a verdict of death.

McConnell v. State, 120 Nev. 1043, 1049–54, 102 P.3d 606, 611–15 (2004) (a copy of
the opinion is found in the record at ECF No. 25-3, pp. 19–34).

McConnell did not file a notice of appeal; however, an appeal was automatic
under to Nev. Rev. Stat. § 177.055. Counsel was appointed for McConnell on the
appeal. See Written Findings of Appellant's Competence, Appointment of Counsel and
Stay of Death Sentence Pending Resolution of Appeal, Exh. 1 (ECF No. 106-1);
Appellant's Opening Brief, Exh. 1 (ECF No. 25-2); Appellant's Reply Brief, Exh. 2 (ECF
No. 25-3, pp. 1–17). On December 29, 2004, the Nevada Supreme Court affirmed
McConnell's conviction and sentence. *McConnell*, 120 Nev. 1043, 102 P.3d 606. The
State filed a petition for rehearing, and the Nevada Supreme Court denied that petition

1 on March 24, 2005. *McConnell v. State*, 121 Nev. 25, 107 P.3d 1287 (2005) (a copy of
2 the opinion is found in the record at ECF No. 25-4). The Nevada Supreme Court issued
3 its remittitur on April 19, 2005. See Remittitur, Exh. 4 (ECF No. 106-4).

4 McConnell filed a petition for writ of habeas corpus in the state district court on
5 June 10, 2005. See Petition for Writ of Habeas Corpus, Exh. 5 (ECF No. 106-5). The
6 court appointed counsel for McConnell. See Order Appointing Counsel, Exh. 7 (ECF
7 No. 106-7). With counsel, McConnell filed a supplement to his petition on January 16,
8 2007. See Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 10
9 (ECF No. 106-10). On June 11, 2007, the state district court ruled that McConnell's
10 claims did not warrant post-conviction relief and dismissed his petition. See Order
11 Dismissing Petition for Writ of Habeas Corpus, Exh. 5 (ECF No. 25-5). McConnell
12 appealed. See Appellant's Opening Brief, Exh. 6 (ECF No. 25-6, ECF No. 25-7, pp.
13 1–28); Appellant's Reply Brief, Exh. 7 (ECF No. 25-7, pp. 29–76); Appellant's
14 Supplemental Opening Brief, Exh. 8 (ECF No. 25-8, pp. 1–38). The Nevada Supreme
15 Court affirmed on July 23, 2009. *McConnell v. State*, 125 Nev. 243, 212 P.3d 307
16 (2009) (as corrected July 24, 2009) (a copy of the opinion (uncorrected) is found in the
17 record at ECF No. 25-8, pp. 39–63). The Nevada Supreme Court denied rehearing on
18 October 6, 2009, and the court's remittitur was issued on November 3, 2009. See
19 Remittitur, Exh. 17 (ECF No. 106-17).

20 McConnell initiated this federal habeas corpus action by filing a pro se petition for
21 writ of habeas corpus on January 13, 2010 (ECF No. 1). After counsel was appointed
22 for McConnell (ECF No. 14), he filed a first amended habeas petition with the benefit of
23 counsel on October 6, 2010 (ECF No. 24).

24 On September 23, 2011, Respondents filed a motion to dismiss (ECF No. 53),
25 arguing that several claims in McConnell's first amended petition were unexhausted in
26 state court. In response, on January 23, 2012, McConnell filed a motion to stay this
27 action (ECF No. 58), to allow him to exhaust his unexhausted claims. On July 27, 2012,
28 the Court granted the motion for stay, and denied the motion to dismiss as moot, and

1 this action was stayed pending completion of McConnell's further state court
2 proceedings. See Order entered July 27, 2012 (ECF No. 71).

3 Meanwhile, on November 1, 2010, McConnell had initiated a second habeas
4 action in state court. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493
5 (ECF No. 96-1). The state district court held an evidentiary hearing. See Transcript of
6 Evidentiary Hearing, September 29, 2014, Exh. 518 (ECF No. 129-2); Transcript of
7 Evidentiary Hearing, September 30, 2014, Exh. 519 (ECF No. 129-3); Transcript of
8 Evidentiary Hearing, December 1, 2015, Exh. 521 (ECF No. 129-5); Transcript of
9 Evidentiary Hearing, December 2, 2015, Exh. 522 (ECF No. 129-6). On June 27, 2016,
10 the state district court denied McConnell's petition. See Order, Exh. 494 (ECF No. 96-
11 2). McConnell appealed. See Appellant's Opening Brief, Exh. 484 (ECF No. 89-1);
12 Appellant's Reply Brief, Exh. 486 (ECF No. 89-3). The Nevada Supreme Court affirmed
13 on September 21, 2018. See Order of Affirmance, Exh. 487 (ECF No. 89-4) (*McConnell*
14 *v. Baker*, 2018 WL 4613718 (2018) (unpublished)). The Nevada Supreme Court denied
15 McConnell's petition for rehearing on December 21, 2018. See Petition for Rehearing,
16 Exh. 488 (ECF No. 89-5); Order Denying Rehearing, Exh. 489 (ECF No. 89-6). On
17 October 7, 2019, the United States Supreme Court denied McConnell's petition for writ
18 of certiorari. See Petition for Writ of Certiorari, Exh. 490 (ECF No. 89-7); Letter Dated
19 October 7, 2019, Exh. 491 (ECF No. 89-8); *McConnell v. Gittere*, 140 S.Ct. 61 (2019).
20 The Nevada Supreme Court's remittitur was issued on October 11, 2019. See
21 Remittitur, Exh. 492 (ECF No. 89-9).

22 The stay of this case was lifted, upon a motion by McConnell, on December 3,
23 2019. (ECF No. 91.) On May 6, 2020, McConnell filed a second amended petition for
24 writ of habeas corpus (ECF No. 95), which is now his operative petition. McConnell's
25 second amended petition asserts the following claims:

26 1. McConnell's federal constitutional rights were violated
27 because of ineffective assistance of his trial counsel.

28 A. Trial counsel were subject to a conflict of
interest.

1 B. Trial counsel were ineffective in their
2 communications with McConnell during the pre-trial period,
3 resulting in his unknowing, involuntary, and unintelligent
4 decisions to represent himself, to plead guilty, and to harm
5 his own interest before and during the penalty hearing.

6 C. Trial counsel were ineffective in failing to
7 adequately investigate mitigation evidence during the pre-
8 trial period.

9 D. Trial counsel were ineffective before and
10 during the hearing on McConnell's motion to represent
11 himself.

12 2. McConnell's waiver of counsel was constitutionally invalid
13 because the court's canvass was inadequate, the court did not appoint
14 conflict-free counsel to advise him, and counsel was ineffective in pre-trial
15 proceedings.

16 A. The trial court's *Faretta* canvass was
17 insufficient.

18 B. McConnell lacked conflict-free counsel leading
19 up to his waiver of counsel and his counsel was ineffective
20 during the pre-trial proceedings, including the *Faretta*
21 hearing.

22 C. McConnell's waiver of counsel was invalid
23 under the intervening United States Supreme Court case of
24 *Indiana v. Edwards*, 554 U.S. 164 (2008).

25 D. The trial court improperly failed to appoint
26 counsel before the sentencing hearing when it was apparent
27 that counsel was necessary.

28 E. The trial court failed to abide by its conditional
 order to appoint counsel when McConnell made a proper
 request that counsel be appointed for the limited purpose of
 allowing him to examine his ex-girlfriends.

 F. The trial court's failure to appoint counsel to
 examine McConnell's ex-girlfriends reduced the proceedings
 to a sham and a farce.

 G. McConnell was incapable of eliciting mitigation
 evidence regarding his childhood and family background.

3 3. McConnell's death sentence is constitutionally invalid
4 because the Nevada Supreme Court failed to strike the felony murder
5 aggravating circumstances.

6 4. McConnell's death sentence is unconstitutional because the
7 mutilation aggravating circumstance is unconstitutionally vague and
8 overbroad.

1 5. McConnell's death sentence is unconstitutional because the
2 burglary aggravating circumstance is constitutionally invalid.

3 6. McConnell's conviction and death sentence are
4 unconstitutional because the trial court failed to adequately apprise
5 McConnell of the consequences of his guilty plea.

6 7. McConnell's death sentence is unconstitutional because the
7 trial court denied his request for April Robinson's pre-sentence report and
8 curtailed his cross-examination of her.

9 8. McConnell's death sentence is unconstitutional because the
10 trial court gave the jury erroneous instructions.

11 A. The jury instructions failed to require that
12 mitigation be outweighed by statutory aggravation beyond a
13 reasonable doubt.

14 B. The jury instructions improperly prohibited the
15 jury from considering sympathy.

16 C. The reasonable doubt instruction permitted the
17 jury to convict McConnell based on a lesser standard of
18 proof than is constitutionally required.

19 D. The "equal and exact justice" instruction
20 created a likelihood that the jury would not apply the
21 presumption of innocence and would convict McConnell
22 based on a lesser standard of proof than is constitutionally
23 required.

24 9. McConnell's death sentence is unconstitutional because of
25 prosecutorial misconduct.

26 10. McConnell's death sentence is unconstitutional because the
27 trial court erroneously allowed the prosecution to introduce unduly
28 prejudicial, lengthy, and irrelevant victim impact statements.

 11. McConnell's death sentence is unconstitutional because he
was given inadequate notice of the prosecution's case in aggravation.

 12. McConnell's death sentence is unconstitutional because the
trial court failed to bifurcate the penalty hearing.

 13. McConnell's death sentence is unconstitutional because of
errors committed by the trial court and the prosecution in systemically
removing all death scrupled jurors from the venire.

 14. McConnell's death sentence is unconstitutional because of
jury misconduct.

 15. McConnell's conviction and death sentence are
unconstitutional because his *Faretta* hearing, plea hearing, sentencing,
and review on direct appeal were conducted before elected officials, and
because the Nevada Supreme Court's automatic review of capital
sentences is inadequate.

A. The Nevada Supreme Court's automatic review of capital sentences is inadequate.

B. McConnell's *Faretta* hearing, plea hearing, sentencing, and review on direct appeal were conducted before elected officials.

16. McConnell's federal constitutional rights were violated because of ineffective assistance of his appellate counsel because his appellate counsel was subject to conflicts of interest and failed to raise issues on appeal.

17. McConnell's conviction and death sentence are unconstitutional because of the cumulative effect of the errors alleged.

18. Nevada's death penalty is unconstitutional.

A. Execution by lethal injection is unconstitutional.

1. Execution by lethal injection is unconstitutional in all circumstances.

2. Execution by lethal injection as it would be carried out in Nevada is unconstitutional.

B. Nevada's death-penalty scheme does not narrow the class of persons eligible for the death penalty.

C. The death penalty is cruel and unusual.

D. Nevada's death-penalty scheme is unconstitutional because executive clemency is unavailable.

E. Nevada's death-penalty scheme operates in an unconstitutionally arbitrary and capricious manner.

F. Trial and appellate counsel were ineffective for failing to raise the claims in 18A, 18B, 18C, 18D and 18E.

Second Amended Petition (ECF No. 95).

On May 28, 2021, Respondents filed the motion to dismiss that is now before the Court (ECF No. 122). In the motion to dismiss, Respondents argue that certain of McConnell's claims are barred by the statute of limitations, unexhausted and/or procedurally defaulted, and/or not ripe for review. McConnell filed an opposition to the motion to dismiss on October 18, 2021 (ECF No. 128), and Respondents filed a reply on February 28, 2022 (ECF No. 145).

Along with his opposition to the motion to dismiss, McConnell filed a motion for an evidentiary hearing (ECF No. 130). Respondents have filed an opposition to that motion (ECF No. 146), and McConnell has filed a reply (ECF No. 150).

III. DISCUSSION

A. Statute of Limitations

1. General Legal Standards

The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996, established a one-year statute of limitations for federal habeas petitions filed by prisoners challenging state convictions or sentences; the statute provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2244(d)(1). The AEDPA statute of limitations is tolled during the time that a properly filed application for state post-conviction or other collateral review is pending in state court. See 28 U.S.C. § 2244(d)(2).

2. Application of the Statute of Limitations in this Case

McConnell's conviction became final on June 22, 2005, which was 90 days after the Nevada Supreme Court denied the State's petition for rehearing of his direct appeal on March 24, 2005. See *McConnell*, 121 Nev. 25, 107 P.3d 1287 (denying petition for rehearing on March 24, 2005); see also *Bowen v. Roe*, 188 F.3d 1157, 1158–59 (9th

1 Cir. 1999) (“We hold that the period of ‘direct review’ in 28 U.S.C. § 2244(d)(1)(A)
2 includes the period within which a petitioner can file for a writ of certiorari from the
3 United States Supreme Court, whether or not the petitioner actually files such a petition.
4 Therefore, when a petitioner fails to seek a writ of certiorari from the United States
5 Supreme Court, the AEDPA’s one-year limitations period begins to run on the date the
6 ninety-day period defined by Supreme Court Rule 13 expires.”).

7 McConnell filed his first state habeas petition on June 10, 2005. before his
8 conviction became final. See Petition for Writ of Habeas Corpus, Exh. 5 (ECF No. 106-
9 5). That tolled the AEDPA limitations period under 28 U.S.C. § 2244(d)(2). Therefore,
10 the AEDPA limitations period was tolled from the time McConnell’s conviction became
11 final on June 22, 2005, until the Nevada Supreme Court’s remittitur was issued on
12 November 3, 2009, concluding McConnell’s first state habeas action. See Remittitur,
13 Exh. 17 (ECF No. 106-17).

14 The AEDPA limitations period relative to McConnell’s federal habeas petition
15 began to run on November 3, 2009, and it ran out on November 3, 2010. Therefore,
16 McConnell’s original petition (ECF No. 1), filed on January 13, 2010, and his first
17 amended petition (ECF No. 24), filed October 6, 2010, were filed before the limitations
18 period expired, but his second amended petition (ECF No. 95), filed April 3, 2020, was
19 filed long after the limitations period expired. This much appears to be undisputed. See
20 Motion to Dismiss (ECF No. 122), p. 6 (Respondents’ assertion that the limitations
21 period ran out on November 3, 2010); Opposition to Motion to Dismiss (ECF No. 128),
22 pp. 6–33 (McConnell treating his original and first amended petitions as filed before
23 expiration of the limitations period and treating his second amended petition as filed
24 after expiration of the limitations period).

25 Therefore, absent a showing that the limitations period for a particular claim
26 commenced to run on a later date under 28 U.S.C. 2244(d)(1)(B), (C) or (D), the
27 application of the statute of limitations to the claims in McConnell’s second amended
28 petition turns on the question whether those claims relate back to McConnell’s original

1 or first amended petition. In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court
 2 held that “[s]o long as the original and amended petitions state claims that are tied to a
 3 common core of operative facts, relation back will be in order,” but “[a]n amended
 4 habeas petition ... does not relate back (and thereby escape AEDPA’s one-year time
 5 limit) when it asserts a new ground for relief supported by facts that differ in both time
 6 and type from those the original pleading set forth.” *Mayle*, 545 U.S. at 650, 664.

7 **B. Exhaustion of State Court Remedies**

8 **1. General Legal Standards**

9 A federal court may not grant relief on a habeas corpus claim not exhausted in
 10 state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of
 11 federal-state comity, and is designed to give state courts the initial opportunity to correct
 12 alleged constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To
 13 exhaust a claim, a petitioner must fairly present that claim to the State’s highest court
 14 and must give that court the opportunity to address and resolve it. See *Duncan v.*
 15 *Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,
 16 10 (1992). The “fair presentation” requirement is satisfied when the claim has been
 17 presented to the highest state court by describing the operative facts and the legal
 18 theory upon which the federal claim is based. See *Anderson v. Harless*, 459 U.S. 4, 6
 19 (1982); *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir.1982), *cert. denied*, 463 U.S.
 20 1212 (1983). To fairly present a federal constitutional claim to the state court, the
 21 petitioner must alert the court to the fact that he asserts a claim under the United States
 22 Constitution. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.1999), *cert. denied*, 529
 23 U.S. 1009 (2000), citing *Duncan*, 513 U.S. at 365–66.

24 **2. Anticipatory Default**

25 The Supreme Court has recognized that under certain circumstances it may be
 26 appropriate for a federal court to anticipate the state-law procedural bar of an
 27 unexhausted claim, and to treat such a claim as subject to the procedural default
 28 doctrine. “An unexhausted claim will be procedurally defaulted, if state procedural rules

1 would now bar the petitioner from bringing the claim in state court.” *Dickens v. Ryan*,
2 740 F.3d 1302, 1317 (9th Cir. 2014) (citing *Coleman v. Thompson*, 501 U.S. 722, 731
3 (1991)).

4 In light of the procedural history of this case, and, in particular, the rulings of the
5 state courts in McConnell’s second state habeas action, it is plain that McConnell’s
6 unexhausted claims would be ruled procedurally barred in state court if McConnell were
7 to return to state court to exhaust those claims. Therefore, the anticipatory default
8 doctrine applies, and the Court considers McConnell’s unexhausted claims to be
9 technically exhausted, but subject to the procedural default doctrine. *See Dickens*, 740
10 F.3d at 1317.

11 **C. Procedural Default**

12 **1. General Legal Standards**

13 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails
14 to comply with the State’s procedural requirements in presenting his claims is barred by
15 the adequate and independent state ground doctrine from obtaining a writ of habeas
16 corpus in federal court. *Coleman*, 501 U.S. at 731-32 (“Just as in those cases in which a
17 state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to
18 meet the State’s procedural requirements for presenting his federal claims has deprived
19 the state courts of an opportunity to address those claims in the first instance.”). Where
20 such a procedural default constitutes an adequate and independent state ground for
21 denial of habeas corpus, the default may be excused only if “a constitutional violation
22 has probably resulted in the conviction of one who is actually innocent,” or if the
23 prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v.*
24 *Carrier*, 477 U.S. 478, 496 (1986).

25 To demonstrate cause for a procedural default, the petitioner must “show that
26 some objective factor external to the defense impeded” his efforts to comply with the
27 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external
28 impediment must have prevented the petitioner from raising the claim. *See McCleskey*

1 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
 2 bears “the burden of showing not merely that the errors [complained of] constituted a
 3 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
 4 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,
 5 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170
 6 (1982)).

7 In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
 8 assistance of post-conviction counsel may serve as cause, to overcome the procedural
 9 default of a claim of ineffective assistance of trial counsel. In *Martinez*, the Supreme
 10 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
 11 postconviction proceeding does not establish cause” to excuse a procedural default.
 12 *Martinez*, 566 U.S. at 15 (citing *Coleman*, 501 U.S. at 746–47). The *Martinez* Court,
 13 however, “qualif[ied] *Coleman* by recognizing a narrow exception: inadequate
 14 assistance of counsel at initial-review collateral proceedings may establish cause for a
 15 prisoner’s procedural default of a claim of ineffective assistance at trial.” *Id.* at 9. The
 16 Court described “initial-review collateral proceedings” as “collateral proceedings which
 17 provide the first occasion to raise a claim of ineffective assistance at trial.” *Id.* at 8.

18 2. Adequacy of Nev. Rev. Stat. §§ 34.726 and 34.810

19 A state procedural rule is “adequate” if it was “clear, consistently applied, and
 20 well-established at the time of the petitioner’s purported default.” *Calderon v. United*
 21 *States Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal
 22 quotation marks omitted); see also *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (state
 23 procedural rule adequate if “firmly established and regularly followed by the time as of
 24 which it is to be applied” (citation and internal quotation marks omitted)); *Lambright v.*
 25 *Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001).

26 In *Bennett v. Mueller*, 322 F.3d 573, 585–86 (9th Cir. 2003), the Ninth Circuit
 27 Court of Appeals established a burden-shifting test for analyzing adequacy. Under
 28 *Bennett*, the State carries the initial burden of pleading “the existence of an independent

1 and adequate state procedural ground as an affirmative defense.” *Bennett*, 322 F.3d at
2 586. The burden then shifts to the petitioner “to place that defense in issue,” which the
3 petitioner may do “by asserting specific factual allegations that demonstrate the
4 inadequacy of the state procedure, including citation to authority demonstrating
5 inconsistent application of the rule.” *Id.* If the petitioner meets this burden, “the ultimate
6 burden” of proving the adequacy of the procedural rule rests with the State, which must
7 demonstrate “that the state procedural rule has been regularly and consistently applied
8 in habeas actions.” *Id.*; see also *King v. Lamarque*, 464 F.3d 963, 966–67 (9th Cir.
9 2006).

10 With respect to Nev. Rev. Stat. § 34.810, Respondents meet their initial burden
11 under *Bennett* by asserting that the Nevada Supreme Court applied that statute to bar
12 certain of McConnell’s claims. See Motion to Dismiss (ECF No. 122), p. 19.

13 McConnell responds by citing *Sechrest v. Ignacio*, 549 F.3d 789 (9th Cir. 2008),
14 and *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002), and noting that in those cases
15 the Ninth Circuit Court of Appeals ruled Nev. Rev. Stat. § 34.810 to be inadequate to
16 support application of the procedural default doctrine. Opposition to Motion to Dismiss
17 (ECF No. 128), p. 66. McConnell’s argument is as follows:

18 The NSC [Nevada Supreme Court] applied Nev. Rev. Stat. §
19 34.810, Nevada’s successive petition bar to Mr. McConnell’s petition. See
20 *generally* ECF No. 89-4. However, the Ninth Circuit has concluded that
21 Nev. Rev. Stat. § 34.810 is an inadequate state procedural bar to federal
22 habeas review in capital cases. See *Sechrest v. Ignacio*, 549 F.3d 789,
803 (9th Cir. 2008) (relying on *Valerio v. Crawford*, 306 F.3d 742, 778 (9th
Cir. 2002)). Thus, it cannot bar review here as applied to any of the claims
in Mr. McConnell’s first or second post-conviction proceedings.

23 *Ibid.*

24 In *Valerio*, the Ninth Circuit Court of Appeals held that Nevada’s successive
25 petition bar was inadequate to bar federal review in capital cases. *Valerio*, 306 F.3d at
26 777–78. In *Sechrest*, the court of appeals followed *Valerio*. *Sechrest*, 549 F.3d at 803
27 (“*Valerio* controls the outcome of the procedural default issue in this case.”).
28

1 Respondents argue that *Valerio* and *Sechrest* are irreconcilable with the
2 Supreme Court's subsequent decisions in *Beard v. Kindler*, 558 U.S. 53 (2009), and
3 *Walker v. Martin*, 562 U.S. 307 (2011), because the Supreme Court in those cases
4 rejected the notion that a state court's discretionary application of a procedural rule
5 necessarily renders it inadequate to bar federal review. See Reply in Support of Motion
6 to Dismiss (ECF No. 145), pp. 24–25. In *Valerio*, the court noted a handful of capital
7 cases in which the Nevada Supreme Court bypassed Nev. Rev. Stat. § 34.810 to reach
8 the merits of a capital petitioner's claim(s). See *Valerio*, 306 F.3d 776–77. Relying on
9 those cases, the court of appeals concluded that the Nevada Supreme Court “exercised
10 a general discretionary power” to address the merits of defaulted claims and on that
11 basis determined that Nev. Rev. Stat. § 34.810 was not an adequate bar to federal
12 review. *Id.* at 778. *Valerio* and *Sechrest* have been called into question by *Beard* and
13 *Walker*. See *Beard*, 558 U.S. at 60–61 (holding that “a discretionary state procedural
14 rule can serve as an adequate ground to bar federal habeas review,” because it can be
15 considered “firmly established” and “regularly followed”) and *Walker*, 562 U.S. at 320
16 (explaining that a rule is not automatically inadequate “upon a showing of seeming
17 inconsistencies” and that the state court must be allowed discretion “to avoid the harsh
18 results that sometimes attend consistent application of an unyielding rule”).

19 Furthermore, *Valerio* and *Sechrest* both addressed the adequacy of Nev. Rev.
20 Stat. § 34.810 during a time period that was long before the procedural default in this
21 case. The court in *Valerio* held that section 34.810 was inadequate in 1990. *Valerio*, 306
22 F.3d at 778. The court in *Sechrest* held that section 34.810 was inadequate in 1985.
23 *Sechrest*, 549 F.3d at 803. In this case, McConnell's briefing on his direct appeal was
24 filed in 2004 (see Appellant's Opening Brief, Exh. 1 (ECF No. 25-2); Appellant's Reply
25 Brief, Exh. 2 (ECF No. 25-3, pp. 1–17)), and McConnell initiated his first state habeas
26 action in 2005 (see Petition for Writ of Habeas Corpus, Exh. 5 (ECF No. 106-5)).
27
28

1 Because *Sechrest* and *Valerio* concerned the adequacy of Nev. Rev. Stat.
 2 § 34.810 during a much earlier time period than is relevant in this case, and because
 3 those cases predated the Supreme Court cases of *Beard* and *Walker*, the Court
 4 determines that McConnell's mere citation of *Sechrest* and *Valerio* does not satisfy his
 5 burden under *Bennett* "to place [the procedural default] defense in issue" by "asserting
 6 specific factual allegations that demonstrate the inadequacy of the state procedure,
 7 including citation to authority demonstrating inconsistent application of the rule." See
 8 *Bennett*, 322 F.3d at 585–86. The Court, therefore, determines that Nev. Rev. Stat.
 9 § 34.810 is adequate to support application of the procedural default doctrine in this
 10 case.

11 With respect to Nev. Rev. Stat. § 34.726, Respondents meet their initial burden
 12 under *Bennett* by asserting that the Nevada Supreme Court applied that statute, as well,
 13 to bar certain of McConnell's claims. See Motion to Dismiss (ECF No. 122), p. 19.
 14 McConnell responds by stating in a conclusory manner that Nev. Rev. Stat. § 34.726 is
 15 inadequate, but he makes no argument supporting that assertion. See Opposition to
 16 Motion to Dismiss (ECF No. 128), pp. 65–66. McConnell does not satisfy his burden
 17 under *Bennett* with respect to section 34.726. The Court determines that Nev. Rev. Stat.
 18 § 34.726 is adequate to support application of the procedural default doctrine in this
 19 case.

20 3. *Independence of Nev. Rev. Stat. §§ 34.726 and 34.810*

21 On the appeal in McConnell's second state habeas action, the Nevada Supreme
 22 Court ruled McConnell's entire petition to be procedurally barred under Nev. Rev. Stat.
 23 §§ 34.726 (statute of limitations) and 34.810 (successive petitions). See Order of
 24 Affirmance, Exh. 487 (ECF No. 89-4).

25 Citing *Rippo v. Baker*, 137 S.Ct. 905 (2017) (per curiam), McConnell argues that
 26 the Nevada Supreme Court's application of those statutes to bar his second state
 27 habeas petition was not independent of federal law and, therefore, cannot support
 28

1 application of the procedural default doctrine. See Opposition to Motion to Dismiss (ECF
2 No. 128), pp. 67–69.

3 “For a state procedural rule to be ‘independent,’ the state law basis for the
4 decision must not be interwoven with the federal law.” *Park v. California*, 202 F.3d 1146,
5 1152 (2000) (citing *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)). The state
6 procedural rule is “so interwoven if ‘the state has made application of the procedural bar
7 depend on an antecedent ruling on federal law [such as] the determination of whether
8 federal constitutional error has been committed.’” *Ibid* (quoting *Ake v. Oklahoma*, 470
9 U.S. 68, 75 (1985)).

10 McConnell relies on a footnote in *Rippo* and argues that the state-law procedural
11 rules were not applied independently of federal law because the Nevada Supreme
12 Court considered the merits of his claims in determining that he did not show cause and
13 prejudice to overcome procedural bars. See Opposition to Motion to Dismiss (ECF No.
14 128), pp. 67–69. In *Rippo*, the Supreme Court reviewed, and overruled, the Nevada
15 Supreme Court's holding regarding a substantive federal-law claim in the case—a claim
16 of unconstitutional judicial bias. See *Rippo*, 137 S.Ct. at 906–07. In a footnote, the Court
17 stated:

18 The [Nevada Supreme Court] further relied on its bias holding to
19 determine that Rippo had not established cause and prejudice to
20 overcome various state procedural bars. 132 Nev., at—, 368 P.3d, at 745.
21 Because the court below did not invoke any state-law grounds
“independent of the merits of [Rippo's] federal constitutional challenge,”
we have jurisdiction to review its resolution of federal law. *Foster v.*
Chatman, 578 U.S.—, —, 136 S.Ct. 1737, 1746, 195 L.Ed.2d 1 (2016).

22 *Id.* at 907 n.1. The Supreme Court recognized that in that case the Nevada Supreme
23 Court's analysis and ruling of the substantive federal claim was antecedent to its ruling
24 regarding the procedural bars. The Nevada Supreme Court had invoked the law of the
25 case doctrine and relied on an earlier ruling on the merits of the judicial bias claim in
26 ruling on the procedural bars. See *Rippo v. State*, 132 Nev. 95, 116–19, 368 P.3d 729,
27 743–45 (2016). That is not the case here. In this case, the Nevada Supreme Court first
28 identified the procedural bars, and stated: “Accordingly, the petition was procedurally

1 barred absent a demonstration of good cause and prejudice, *see* NRS 34.726(1); NRS
2 34.810(1)-(3), or a showing that the procedural bars should be excused to prevent a
3 fundamental miscarriage of justice, *see Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d
4 519, 537 (2001).” Order of Affirmance, Exh. 487, pp. 1–2 (ECF No. 89-4, pp. 2–3). Only
5 then did the court go on to determine that McConnell failed to show cause and
6 prejudice. *See id.* at 2–9 (ECF No. 89-4, pp. 3–10). In this case, the Nevada Supreme
7 Court’s consideration of the merits of the federal claims was not antecedent to the ruling
8 regarding the procedural bars.

9 Where a state court considers the merits of a claim only to demonstrate that the
10 petitioner cannot overcome a state-law procedural bar of the claim, the procedural bar
11 remains independent of federal law, such that it supports application of the procedural
12 default doctrine. *See Nitschke v. Belleque*, 680 F.3d 1105, 1111–12 (9th Cir. 2012)
13 (holding that the Oregon Court of Appeals’ application of the Oregon “plain error” rule to
14 the petitioner’s federal law claim was independent of federal law); *Moran v. McDaniel*,
15 80 F.3d 1261, 1268–70 (1996) (holding a Nevada procedural rule independent where
16 the Nevada Supreme Court discussed the merits of the claim “strictly for the purpose of
17 demonstrating that [the petitioner could not] overcome his procedural defaults by a
18 showing of cause and prejudice”).

19 The Court finds that the Nevada Supreme Court considered the merits of
20 McConnell’s claims only to demonstrate that McConnell did not overcome the
21 procedural bars, and the consideration of the merits of the claims was not antecedent to
22 the cause-and-prejudice determination. The Nevada Supreme Court’s application of the
23 procedural bars was independent of federal law, such that it can support application of
24 the procedural default doctrine.

25 **D. Claim-Specific Analysis**

26 1. Claim 1A

27 In Claim 1A, McConnell claims that his federal constitutional rights were violated
28 because of ineffective assistance of his trial counsel, because his trial counsel were

1 subject to a conflict of interest. Second Amended Petition (ECF No. 95), pp. 6–28. (In
2 this order, the Court refers to the counsel who represented McConnell for a time in the
3 state district court, before trial, as his “trial counsel.”)

4 Respondents argue that Claim 1A is barred by the statute of limitations. See
5 Motion to Dismiss (ECF No. 122), pp. 6–7; Reply (ECF No. 145), pp. 13–16. The Court
6 disagrees. Claim 1A, as asserted in McConnell’s second amended petition, shares a
7 common core of operative fact with Claim 1A of McConnell’s first amended petition
8 (ECF No. 24 at 6–12), and, therefore, Claim 1A relates back to the first amended
9 petition and is not barred by the statute of limitations. The Court will deny Respondents’
10 motion to dismiss Claim 1A on statute of limitations grounds.

11 Respondents also contend that Claim 1A is procedurally defaulted. See Motion to
12 Dismiss (ECF No. 122), pp. 20–21; Reply (ECF No. 145), pp. 28–30. McConnell argues
13 that, because Claim 1A is a claim of ineffective assistance of trial counsel, he can
14 overcome any procedural default of the claim by showing cause and prejudice, on
15 account of ineffective assistance of his state post-conviction counsel, under *Martinez*.
16 See Opposition to Motion to Dismiss (ECF No. 128), pp. 106–15. This issue, though, is
17 intertwined with the merits of Claim 1A (as it involves the question whether the
18 underlying claim is substantial); therefore, the Court determines that it will be better
19 addressed in conjunction with the merits of the claim, after Respondents file an answer
20 and McConnell files a reply. Consequently, the Court will deny Respondents’ motion to
21 dismiss Claim 1A on procedural default grounds, without prejudice to Respondents
22 asserting the procedural default defense to Claim 1A in their answer.

23 2. Claim 1B

24 In Claim 1B, McConnell claims that his federal constitutional rights were violated
25 because of ineffective assistance of his trial counsel, because trial counsel were
26 ineffective in their communications with McConnell during the pre-trial period, resulting
27 in his unknowing, involuntary, and unintelligent decisions to represent himself, to plead
28

1 guilty, and to harm his own interest before and during the penalty hearing. Second
2 Amended Petition (ECF No. 95), pp. 6–8, 28–36.

3 Respondents argue that Claim 1B is barred by the statute of limitations. See
4 Motion to Dismiss (ECF No. 122), p. 7; Reply (ECF No. 145), p. 16. The Court,
5 however, determines that Claim 1B, as asserted in McConnell's second amended
6 petition, shares a common core of operative fact with Claim 1B of McConnell's first
7 amended petition (ECF No. 24 at 6–7, 12–17), and, therefore, Claim 1B relates back to
8 the first amended petition and is not barred by the statute of limitations. The Court will
9 deny Respondents' motion to dismiss Claim 1B on statute of limitations grounds.

10 Respondents also contend that Claim 1B is procedurally defaulted. See Motion to
11 Dismiss (ECF No. 122), p. 21; Reply (ECF No. 145), pp. 30–31. McConnell argues that,
12 because Claim 1B is a claim of ineffective assistance of trial counsel, he can overcome
13 any procedural default of the claim by showing cause and prejudice, on account of
14 ineffective assistance of his state post-conviction counsel, under *Martinez*. See
15 Opposition to Motion to Dismiss (ECF No. 128), pp. 106–12, 116–17. This issue, though,
16 is intertwined with the merits of Claim 1B; therefore, the Court determines that it will be
17 better addressed in conjunction with the merits of the claim, after Respondents file an
18 answer and McConnell files a reply. Consequently, the Court will deny Respondents'
19 motion to dismiss Claim 1B on procedural default grounds, without prejudice to
20 Respondents asserting the procedural default defense to Claim 1B in their answer.

21 3. Claim 1C

22 In Claim 1C, McConnell claims that his federal constitutional rights were violated
23 because of ineffective assistance of his trial counsel, because trial counsel were
24 ineffective in failing to adequately investigate mitigation evidence during the pre-trial
25 period. Second Amended Petition (ECF No. 95), pp. 6–8, 36–152.

26 Respondents argue that Claim 1C is barred by the statute of limitations. See
27 Motion to Dismiss (ECF No. 122), pp. 7–8; Reply (ECF No. 145), pp. 16–17. The Court,
28 however, determines that Claim 1C, as asserted in McConnell's second amended

1 petition, shares a common core of operative fact with Claim 1C of McConnell's first
2 amended petition (ECF No. 24 at 6–7, 18–95), and, therefore, Claim 1C relates back to
3 the first amended petition and is not barred by the statute of limitations. The Court will
4 deny Respondents' motion to dismiss Claim 1C on statute of limitations grounds.

5 Respondents contend that Claim 1C is procedurally defaulted. See Motion to
6 Dismiss (ECF No. 122), p. 21; Reply (ECF No. 145), p. 31. McConnell argues that,
7 because Claim 1C is a claim of ineffective assistance of trial counsel, he can overcome
8 any procedural default of the claim by showing cause and prejudice, on account of
9 ineffective assistance of his state post-conviction counsel, under *Martinez*. See
10 Opposition to Motion to Dismiss (ECF No. 128), pp.106–12, 118–29. This issue, though,
11 is intertwined with the merits of Claim 1C; therefore, the Court determines that it will be
12 better addressed in conjunction with the merits of the claim, after Respondents file an
13 answer and McConnell files a reply. Consequently, the Court will deny Respondents'
14 motion to dismiss Claim 1C on procedural default grounds, without prejudice to
15 Respondents asserting the procedural default defense to Claim 1C in their answer.

16 4. Claim 1D

17 In Claim 1D, McConnell claims that his federal constitutional rights were violated
18 because of ineffective assistance of his trial counsel, because trial counsel were
19 ineffective before and during the hearing on McConnell's motion to represent himself.
20 Second Amended Petition (ECF No. 95), pp. 6–8, 152–58.

21 Respondents concede, and the Court finds, that Claim 1D of McConnell's second
22 amended petition relates back to Claim 1D of his first amended petition, and, therefore,
23 is not barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 8;
24 Reply (ECF No. 145), p. 17; see *a/so* First Amended Petition (ECF No. 24), pp. 6–7,
25 95–99). The Court will deny Respondents' motion to dismiss Claim 1D on statute of
26 limitations grounds.

27 Respondents contend that Claim 1D is, either in part or in its entirety,
28 procedurally defaulted. See Motion to Dismiss (ECF No. 122), pp. 21–22; Reply (ECF

No. 145), pp. 31–32. McConnell argues that, because Claim 1D is a claim of ineffective assistance of trial counsel, he can overcome any procedural default of the claim by showing cause and prejudice, on account of ineffective assistance of his state post-conviction counsel, under *Martinez*. See Opposition to Motion to Dismiss (ECF No. 128), pp.106–12, 129–33. This issue, though, is intertwined with the merits of Claim 1D; therefore, the Court determines that it will be better addressed in conjunction with the merits of the claim, after Respondents file an answer and McConnell files a reply. Consequently, the Court will deny Respondents’ motion to dismiss Claim 1D on procedural default grounds, without prejudice to Respondents asserting the procedural default defense to Claim 1D in their answer.

5. *Claim 1E*

Claim 1E of McConnell’s second amended petition is entitled “Prejudice.” See Second Amended Petition (ECF No. 95), p. 158. There, McConnell asserts that he was prejudiced by the ineffective assistance of trial counsel alleged in Claims 1A, 1B, 1C and 1D. *Id.* at 158–60. The Court does not understand Claim 1E to set forth a separate claim, but, rather, only to add to Claims 1A, 1B, 1C and 1D. The Court treats Claim 1E as such in this order. The motion to dismiss will be denied with respect to what is designated Claim 1E in the second amended petition.

6. *Claim 2A*

In Claim 2A, McConnell claims that his federal constitutional rights were violated because the trial court’s canvass pursuant to *Faretta v. California*, 422 U.S. 806 (1975), was insufficient. Second Amended Petition (ECF No. 95), pp. 161–67.

Respondents concede, and the Court finds, that Claim 2A of McConnell’s second amended petition relates back to Claim 2A of his first amended petition, and, therefore, is not barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 8; Reply (ECF No. 145), p. 18; see *a/so* First Amended Petition (ECF No. 24), pp. 102–05. The Court will deny Respondents’ motion to dismiss Claim 2A on statute of limitations grounds.

Respondents argue that Claim 2A is procedurally defaulted. See Motion to Dismiss (ECF No. 122), pp. 23–24; Reply (ECF No. 145), p. 33. The Court agrees. McConnell first asserted this claim in his second state habeas petition. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 108–11 (ECF No. 96-1, pp. 109–12). The Nevada Supreme Court ruled McConnell’s entire second state habeas petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural default doctrine. See Part III.C.2., *supra*. The Court also determines that the Nevada Supreme Court’s application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent of federal law. See Part III.C.3., *supra*. McConnell does not make any showing of cause and prejudice relative to the procedural default of this claim, or any other showing that excuses the procedural default. The Court will grant Respondents’ motion to dismiss Claim 2A on the ground of procedural default.

7. Claim 2B

In Claim 2B, McConnell claims that his federal constitutional rights were violated because he lacked conflict-free counsel leading up to his waiver of counsel and his counsel was ineffective during the pre-trial proceedings, including the *Faretta* hearing. Second Amended Petition (ECF No. 95), pp. 161–62, 167–71.

This claim reiterates claims made by McConnell in Claims 1A, 1B, 1C, 1D and 1E. As the Court will deny Respondents’ motion to dismiss with respect to those claims, the Court will deny the motion to dismiss with respect to Claim 2B for the same reasons.

8. Claim 2C

In Claim 2C, McConnell claims that his waiver of counsel was invalid under the intervening United States Supreme Court case of *Indiana v. Edwards*, 554 U.S. 164 (2008). Second Amended Petition (ECF No. 95), pp. 161–62, 171–73.

Claim 2C is essentially the same claim as Claim 2A, but with argument regarding the implications of a particular Supreme Court case. As with Claim 2A, Respondents

1 concede that Claim 2C of McConnell's second amended petition relates back to his first
2 amended petition, and, therefore, is not barred by the statute of limitations. See Motion
3 to Dismiss (ECF No. 122), pp. 8–9; Reply (ECF No. 145), p. 19. The Court will deny
4 Respondents' motion to dismiss Claim 2C on statute of limitations grounds.

5 Respondents argue that Claim 2C is procedurally defaulted. See Motion to
6 Dismiss (ECF No. 122), pp. 23–24; Reply (ECF No. 145), p. 33. The Court agrees.
7 McConnell first asserted a claim like Claim 2C on the appeal in his first state habeas
8 action, by moving for leave to present the claim in supplemental briefing, see
9 Appellant's Supplemental Opening Brief, Exh. 8 (ECF No. 25-8, pp. 1–39), but the
10 Nevada Supreme Court denied that motion because McConnell had not raised the issue
11 in the state district court, and he did not make a showing of cause and prejudice relative
12 to his failure to do so. See Order Denying Motion to File Supplemental Opening Brief,
13 Exh. 463 (ECF No. 59-1, pp. 45–47). McConnell then asserted claims in his second
14 state habeas petition that encompassed what is Claim 2C in this case. See Petition for
15 Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 108–29 (ECF No. 96-1, pp.
16 109–30). The Nevada Supreme Court ruled McConnell's entire second state habeas
17 petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See
18 Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines that Nev. Rev.
19 Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural
20 default doctrine. See Part III.C.2., *supra*. The Court also determines that the Nevada
21 Supreme Court's application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent
22 of federal law. See Part III.C.3., *supra*. McConnell does not make any showing of cause
23 and prejudice relative to the procedural default of this claim, or any other showing that
24 excuses the procedural default. The Court will grant Respondents' motion to dismiss
25 Claim 2C on the ground of procedural default.

26 9. Claim 2D

27 In Claim 2D, McConnell claims that his federal constitutional rights were violated
28 because the trial court improperly failed to appoint counsel before the sentencing

1 hearing when it was apparent that counsel was necessary. Second Amended Petition
2 (ECF No. 95), pp. 161–62, 173–75.

3 Respondents concede, and the Court finds, that Claim 2D of McConnell's second
4 amended petition relates back to Claim 2B of his first amended petition, and, therefore,
5 is not barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 9;
6 Reply (ECF No. 145), p. 18; see *a/so* First Amended Petition (ECF No. 24), pp. 102,
7 105–06. The Court will deny Respondents' motion to dismiss Claim 2D on statute of
8 limitations grounds.

9 Respondents argue that Claim 2D is procedurally defaulted. See Motion to
10 Dismiss (ECF No. 122), pp. 23–24; Reply (ECF No. 145), p. 33. The Court agrees.
11 McConnell first asserted this claim in his second state habeas petition. See Petition for
12 Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 111–13 (ECF No. 96-1,
13 pp. 112–14). The Nevada Supreme Court ruled McConnell's entire second state habeas
14 petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See
15 Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines that Nev. Rev.
16 Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural
17 default doctrine. See Part III.C.2., *supra*. The Court also determines that the Nevada
18 Supreme Court's application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent
19 of federal law. See Part III.C.3., *supra*. McConnell does not make any showing of cause
20 and prejudice relative to the procedural default of this claim, or any other showing that
21 excuses the procedural default. The Court will grant Respondents' motion to dismiss
22 Claim 2D on the ground of procedural default.

23 10. Claim 2E

24 In Claim 2E, McConnell claims that his federal constitutional rights were violated
25 because the trial court failed to abide by its conditional order to appoint counsel when
26 McConnell made a proper request that counsel be appointed for the limited purpose of
27 allowing him to examine his ex-girlfriends. Second Amended Petition (ECF No. 95), pp.
28 161–62, 175–77.

1 Respondents concede, and the Court finds, that Claim 2E of McConnell's second
 2 amended petition relates back to Claim 2C of his first amended petition, and, therefore,
 3 is not barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 9;
 4 Reply (ECF No. 145), p. 18; see *also* First Amended Petition (ECF No. 24), pp. 102,
 5 107–08. The Court will deny Respondents' motion to dismiss Claim 2E on statute of
 6 limitations grounds.

7 Respondents argue that Claim 2E is procedurally defaulted. See Motion to
 8 Dismiss (ECF No. 122), pp. 23–24; Reply (ECF No. 145), p. 33. The Court agrees.
 9 McConnell first asserted this claim in his second state habeas petition. See Petition for
 10 Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 113–14 (ECF No. 96-1,
 11 pp. 114–15). The Nevada Supreme Court ruled McConnell's entire second state habeas
 12 petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See
 13 Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines that Nev. Rev.
 14 Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural
 15 default doctrine. See Part III.C.2., *supra*. The Court also determines that the Nevada
 16 Supreme Court's application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent
 17 of federal law. See Part III.C.3., *supra*. McConnell does not make any showing of cause
 18 and prejudice relative to the procedural default of this claim, or any other showing that
 19 excuses the procedural default. The Court will grant Respondents' motion to dismiss
 20 Claim 2E on the ground of procedural default.

21 11. Claim 2F

22 In Claim 2F, McConnell claims that his federal constitutional rights were violated
 23 because the trial court's failure to appoint counsel to examine McConnell's ex-girlfriends
 24 reduced the proceedings to a sham and a farce. Second Amended Petition (ECF No.
 25 95), pp. 161–62, 177–92.

26 Respondents concede, and the Court finds, that Claim 2F of McConnell's second
 27 amended petition relates back to Claim 2D of his first amended petition, and, therefore,
 28 is not barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 9;

1 Reply (ECF No. 145), p. 18; *see also* First Amended Petition (ECF No. 24), pp. 102,
 2 108–18. The Court will deny Respondents’ motion to dismiss Claim 2F on statute of
 3 limitations grounds.

4 Respondents argue that Claim 2F is procedurally defaulted. *See* Motion to
 5 Dismiss (ECF No. 122), pp. 23–24; Reply (ECF No. 145), p. 33. The Court agrees.
 6 McConnell first asserted this claim in his second state habeas petition. *See* Petition for
 7 Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 114–25 (ECF No. 96-1,
 8 pp. 115–26). The Nevada Supreme Court ruled McConnell’s entire second state habeas
 9 petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. *See*
 10 Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines that Nev. Rev.
 11 Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural
 12 default doctrine. *See* Part III.C.2., *supra*. The Court also determines that the Nevada
 13 Supreme Court’s application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent
 14 of federal law. *See* Part III.C.3., *supra*. McConnell does not make any showing of cause
 15 and prejudice relative to the procedural default of this claim, or any other showing that
 16 excuses the procedural default. The Court will grant Respondents’ motion to dismiss
 17 Claim 2F on the ground of procedural default.

18 12. Claim 2G

19 In Claim 2G, McConnell claims that his federal constitutional rights were violated
 20 because he was incapable of eliciting mitigation evidence regarding his childhood and
 21 family background. Second Amended Petition (ECF No. 95), pp. 161–62, 192–97.

22 Respondents concede, and the Court finds, that Claim 2G of McConnell’s second
 23 amended petition relates back to Claim 2E of his first amended petition, and, therefore,
 24 is not barred by the statute of limitations. *See* Motion to Dismiss (ECF No. 122), p. 9;
 25 Reply (ECF No. 145), p. 18; *see also* First Amended Petition (ECF No. 24), pp. 102,
 26 118–22. The Court will deny Respondents’ motion to dismiss Claim 2G on statute of
 27 limitations grounds.
 28

1 Respondents argue that Claim 2G is procedurally defaulted. See Motion to
2 Dismiss (ECF No. 122), pp. 23–24; Reply (ECF No. 145), p. 33. The Court agrees.
3 McConnell first asserted this claim in his second state habeas petition. See Petition for
4 Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 125–28 (ECF No. 96-1,
5 pp. 126–29). The Nevada Supreme Court ruled McConnell's entire second state habeas
6 petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See
7 Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines that Nev. Rev.
8 Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural
9 default doctrine. See Part III.C.2., *supra*. The Court also determines that the Nevada
10 Supreme Court's application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent
11 of federal law. See Part III.C.3., *supra*. McConnell does not make any showing of cause
12 and prejudice relative to the procedural default of this claim, or any other showing that
13 excuses the procedural default. The Court will grant Respondents' motion to dismiss
14 Claim 2G on the ground of procedural default.

15 *13. Claim 2H*

16 Claim 2H of McConnell's second amended petition is entitled "Prejudice." See
17 Second Amended Petition (ECF No. 95), p. 197. There, McConnell asserts that he was
18 prejudiced by the errors alleged in Claims 2A, 2B, 2C, 2D, 2E, 2F and 2G. *Id.* at 197–
19 98. The Court does not understand Claim 2H to set forth a separate claim, but, rather,
20 only to add to Claims 2A, 2B, 2C, 2D, 2E, 2F and 2G. The Court treats Claim 2H as
21 such in this order. The motion to dismiss will be denied with respect to what is
22 designated Claim 2H in the second amended petition.

23 *14. Claim 3*

24 In Claim 3, McConnell claims that his death sentence is constitutionally invalid
25 because the Nevada Supreme Court failed to strike the felony murder aggravating
26 circumstances. Second Amended Petition (ECF No. 95), pp. 199–204.

27 Respondents concede, and the Court finds, that Claim 3 of McConnell's second
28 amended habeas petition relates back to Claim 3 of his first amended petition, and that,

1 therefore, Claim 3 is not barred by the statute of limitations. See Motion to Dismiss
2 (ECF No. 122), p. 10; Reply (ECF No. 145), p. 19; see *also* First Amended Petition
3 (ECF No. 24), pp. 124–27. The Court will deny Respondents’ motion to dismiss Claim 3
4 on statute of limitations grounds.

5 Respondents argue that Claim 3 is procedurally defaulted. See Motion to Dismiss
6 (ECF No. 122), p. 24; Reply (ECF No. 145), pp. 33–38. The Court, however, determines
7 that McConnell raised this claim on his direct appeal. See Appellant’s Opening Brief,
8 Exh. 1, pp. 48–49 (ECF No. 25-2, pp. 54–55. The Nevada Supreme Court ruled on the
9 issue on its merits. See *McConnell*, 120 Nev. at 1049, 1062–70, 102 P.3d at 611, 620–
10 25. In particular, the Nevada Supreme Court ruled as follows with respect to the
11 contention that the felony murder aggravating circumstances should have been stricken:

12 In charging McConnell with first-degree murder, the State alleged
13 two theories: deliberate, premeditated murder and felony murder during
14 the perpetration of a burglary. McConnell was advised of both theories
15 when he pleaded guilty. During his testimony, McConnell admitted that he
16 had premeditated the murder: “Nothing justifies cold-blooded,
17 premeditated, first-degree murder, which is what I did.” His other
testimony and the evidence as a whole overwhelmingly supported this
admission. McConnell’s conviction for first-degree murder is therefore
soundly based on a theory of deliberate, premeditated murder.
Consequently, our ensuing analysis and decision do not invalidate the use
of the felony aggravating circumstances in this case.

18 *McConnell*, 120 Nev. at 1062, 102 P.3d at 620. In his first state habeas petition,
19 McConnell raised a similar claim, focusing on the Nevada Supreme Court’s ruling that
20 the felony murder aggravating circumstances did not have to be stricken in McConnell’s
21 case. See Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 10,
22 pp. 16–25 (ECF No. 106-10, pp. 17–26). On the appeal in that case, the Nevada
23 Supreme Court ruled that the claim was raised on McConnell’s direct appeal—that it
24 was, in fact, “the focus of [the court’s] decision on the direct appeal”—and the court
25 applied the law of the case doctrine and affirmed the denial of relief on the claim.
26 *McConnell*, 125 Nev. at 257, 212 P.3d at 317. Then, in McConnell’s second state
27 habeas petition, he again raised the claim, further focusing it and framing it like he does
28 in Claim 3 in this case. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh.

493, pp. 130–33 (ECF No. 96-1, pp. 131–34). The Nevada Supreme Court ruled McConnell's entire second state habeas petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-4). But because the claim was asserted and addressed on its merits on McConnell's direct appeal, as was recognized by the Nevada Supreme Court on the appeal in McConnell's first state habeas action, it is not procedurally defaulted. The Court will, therefore, deny Respondents' motion to dismiss Claim 3 on procedural default grounds.

15. *Claim 4*

In Claim 4, McConnell claims that his death sentence is unconstitutional because the mutilation aggravating circumstance is unconstitutionally vague and overbroad. Second Amended Petition (ECF No. 95), pp. 205–15.

Respondents concede, and the Court finds, that Claim 4 of McConnell's second amended habeas petition relates back to Claim 4 of his first amended petition, and that, therefore, Claim 4 is not barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 10; Reply (ECF No. 145), p. 19; see *also* First Amended Petition (ECF No. 24), pp. 128–34. The Court will deny Respondents' motion to dismiss Claim 4 on statute of limitations grounds.

Respondents argue that Claim 4 is procedurally defaulted. See Motion to Dismiss (ECF No. 122), pp. 24–25; Reply (ECF No. 145), pp. 38–39. This argument is well taken. On his direct appeal, McConnell claimed that the evidence did not support application of the mutilation aggravating circumstance (see Appellant's Opening Brief, Exh. 1, pp. 50–51 (ECF No. 25-2, pp. 56–57)); however, he did not on his direct appeal claim that the mutilation aggravating circumstance is unconstitutionally vague and overbroad. McConnell did make a claim such as that in Claim 4 in his second state habeas petition (see Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 132–40 (ECF No. 96-1, pp. 133–41)), but The Nevada Supreme Court ruled McConnell's entire second state habeas petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-4).

1 The Court determines that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate to
2 support application of the procedural default doctrine. See Part III.C.2., *supra*. The
3 Court also determines that the Nevada Supreme Court's application of Nev. Rev. Stat.
4 §§ 34.726 and 34.810 was independent of federal law. See Part III.C.3., *supra*.
5 McConnell does not make any showing of cause and prejudice relative to the
6 procedural default of this claim, or any other showing that excuses the procedural
7 default. The Court will grant Respondents' motion to dismiss Claim 4 on procedural
8 default grounds.

9 16. *Claim 5*

10 In Claim 5, McConnell claims that his death sentence is unconstitutional because
11 the burglary aggravating circumstance is constitutionally invalid. Second Amended
12 Petition (ECF No. 95), pp. 216–18. More specifically, McConnell claims that, because
13 premeditated murder and the burglary he was charged with require the same *mens*
14 *rea*—intent to commit murder—the burglary aggravating circumstance does not narrow
15 the class of murderers eligible for the death penalty. *Ibid*.

16 Respondents concede, and the Court finds, that Claim 5 of McConnell's second
17 amended habeas petition relates back to Claim 5 of his first amended petition, and that,
18 therefore, Claim 5 is not barred by the statute of limitations. See Motion to Dismiss
19 (ECF No. 122), p. 11; Reply (ECF No. 145), p. 19; see *also* First Amended Petition
20 (ECF No. 24), pp. 135–37. The Court will deny Respondents' motion to dismiss Claim 5
21 on statute of limitations grounds.

22 Respondents do not argue that Claim 5 is procedurally defaulted.

23 17. *Claim 6*

24 In Claim 6, McConnell claims that his conviction and death sentence are
25 unconstitutional because the trial court failed to adequately apprise him of the
26 consequences of his guilty plea. Second Amended Petition (ECF No. 95), pp. 219–22.

27 Respondents concede, and the Court finds, that Claim 6 of McConnell's second
28 amended habeas petition relates back to Claim 6 of his first amended petition, and that,

1 therefore, Claim 6 is not barred by the statute of limitations. See Motion to Dismiss
2 (ECF No. 122), p. 11; Reply (ECF No. 145), p. 19; see *also* First Amended Petition
3 (ECF No. 24), pp. 138–40. The Court will deny Respondents’ motion to dismiss Claim 6
4 on statute of limitations grounds.

5 Respondents do not argue that Claim 6 is procedurally defaulted.

6 *18. Claim 7*

7 In Claim 7, McConnell claims that his death sentence is unconstitutional because
8 the trial court denied his request for April Robinson’s pre-sentence report and curtailed
9 his cross-examination of her. Second Amended Petition (ECF No. 95), pp. 219–22.

10 Respondents concede, and the Court finds, that Claim 7 of McConnell’s second
11 amended habeas petition relates back to Claim 7 of his first amended petition, and that,
12 therefore, Claim 7 is not barred by the statute of limitations. See Motion to Dismiss
13 (ECF No. 122), pp. 11–12; Reply (ECF No. 145), p. 19; see *also* First Amended Petition
14 (ECF No. 24), pp. 141–44. The Court will deny Respondents’ motion to dismiss Claim 7
15 on statute of limitations grounds.

16 Respondents argue that Claim 7 is procedurally defaulted. See Motion to Dismiss
17 (ECF No. 122), p. 25; Reply (ECF No. 145), p. 39. The Court agrees. McConnell first
18 made a claim such as that in Claim 7 in his second state habeas petition. See Petition
19 for Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 146–49 (ECF No. 96-1,
20 pp. 147–50). The Nevada Supreme Court ruled McConnell’s entire second state habeas
21 petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See
22 Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines that Nev. Rev.
23 Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural
24 default doctrine. See Part III.C.2., *supra*. The Court also determines that the Nevada
25 Supreme Court’s application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent
26 of federal law. See Part III.C.3., *supra*. McConnell does not make any showing of cause
27 and prejudice relative to the procedural default of this claim, or any other showing that
28

1 excuses the procedural default. The Court will grant Respondents' motion to dismiss
2 Claim 7 on procedural default grounds.

3 19. *Claim 8A*

4 In Claim 8A, McConnell claims that his death sentence is unconstitutional
5 because the jury instructions failed to require that mitigation be outweighed by statutory
6 aggravation beyond a reasonable doubt. Second Amended Petition (ECF No. 95), pp.
7 229–31.

8 Respondents concede, and the Court finds, that Claim 8A of McConnell's second
9 amended habeas petition relates back to Claim 8A of his first amended petition, and
10 that, therefore, Claim 8A is not barred by the statute of limitations. See Motion to
11 Dismiss (ECF No. 122), p. 12; Reply (ECF No. 145), p. 19; *see also* First Amended
12 Petition (ECF No. 24), pp. 145–46. The Court will deny Respondents' motion to dismiss
13 Claim 8A on statute of limitations grounds.

14 Respondents argue that Claim 8A is procedurally defaulted. See Motion to
15 Dismiss (ECF No. 122), pp. 25–26; Reply (ECF No. 145), pp. 39–40. In response,
16 McConnell argues that he can show cause and prejudice relative to the claim, such as
17 to overcome any procedural default of the claim, on account of ineffective assistance of
18 his appellate counsel for not raising the claim on his direct appeal. See Opposition to
19 Motion to Dismiss (ECF No. 128), pp. 75–76. In their reply, Respondents acknowledge
20 this argument by McConnell and state that, “because McConnell claims he can
21 overcome his default by showing appellate counsel was ineffective for failing to raise
22 this on appeal, this Court should defer ruling on the procedural default issue until
23 Respondents have had a chance to address the related ineffective assistance of
24 appellate counsel claims from Ground Sixteen on the merits in an answer.” Reply (ECF
25 No. 145), p. 40. The Court agrees with this approach. The Court will deny the motion to
26 dismiss Claim 8A on procedural default grounds, without prejudice to Respondents
27 asserting the procedural default defense to Claim 8A in their answer.
28

1 20. *Claim 8B*

2 In Claim 8B, McConnell claims that his death sentence is unconstitutional
3 because the jury instructions improperly prohibited the jury from considering sympathy.
4 Second Amended Petition (ECF No. 95), pp. 229, 231–32.

5 Respondents concede, and the Court finds, that Claim 8B of McConnell's second
6 amended habeas petition relates back to Claim 8B of his first amended petition, and
7 that, therefore, Claim 8B is not barred by the statute of limitations. See Motion to
8 Dismiss (ECF No. 122), p. 12; Reply (ECF No. 145), p. 19; *see also* First Amended
9 Petition (ECF No. 24), pp. 145–47. The Court will deny Respondents' motion to dismiss
10 Claim 8B on statute of limitations grounds.

11 Respondents argue that Claim 8B is procedurally defaulted. See Motion to
12 Dismiss (ECF No. 122), pp. 25–26; Reply (ECF No. 145), p. 40. The Court agrees.
13 McConnell first made a claim such as that in Claim 8B in his second state habeas
14 petition. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 150–
15 52 (ECF No. 96-1, pp. 152–53). The Nevada Supreme Court ruled McConnell's entire
16 second state habeas petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726
17 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines
18 that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate to support application of
19 the procedural default doctrine. See Part III.C.2., *supra*. The Court also determines that
20 the Nevada Supreme Court's application of Nev. Rev. Stat. §§ 34.726 and 34.810 was
21 independent of federal law. See Part III.C.3., *supra*. McConnell does not make any
22 showing of cause and prejudice relative to the procedural default of this claim, or any
23 other showing that excuses the procedural default. The Court will grant Respondents'
24 motion to dismiss Claim 8B on procedural default grounds.

25 21. *Claim 8C*

26 In Claim 8C, McConnell claims that his death sentence is unconstitutional
27 because the reasonable doubt instruction permitted the jury to convict McConnell based
28

1 on a lesser standard of proof than is constitutionally required. Second Amended Petition
2 (ECF No. 95), pp. 229, 232–34.

3 Respondents concede, and the Court finds, that Claim 8C of McConnell's second
4 amended habeas petition relates back to Claim 8C of his first amended petition, and
5 that, therefore, Claim 8C is not barred by the statute of limitations. See Motion to
6 Dismiss (ECF No. 122), p. 12; Reply (ECF No. 145), p. 19; *see also* First Amended
7 Petition (ECF No. 24), pp. 145, 147–48. The Court will deny Respondents' motion to
8 dismiss Claim 8C on statute of limitations grounds.

9 Respondents argue that Claim 8C is procedurally defaulted. See Motion to
10 Dismiss (ECF No. 122), pp. 25–26; Reply (ECF No. 145), p. 40. The Court agrees.
11 McConnell first made a claim such as that in Claim 8C in his second state habeas
12 petition. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 150,
13 152–53 (ECF No. 96-1, pp. 151, 153–54). The Nevada Supreme Court ruled
14 McConnell's entire second state habeas petition to be procedurally barred under Nev.
15 Rev. Stat. §§ 34.726 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-4).
16 The Court determines that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate to
17 support application of the procedural default doctrine. See Part III.C.2., *supra*. The
18 Court also determines that the Nevada Supreme Court's application of Nev. Rev. Stat.
19 §§ 34.726 and 34.810 was independent of federal law. See Part III.C.3., *supra*.
20 McConnell does not make any showing of cause and prejudice relative to the
21 procedural default of this claim, or any other showing that excuses the procedural
22 default. The Court will grant Respondents' motion to dismiss Claim 8C on procedural
23 default grounds.

24 22. Claim 8D

25 In Claim 8D, McConnell claims that his death sentence is unconstitutional
26 because the “equal and exact justice” instruction created a likelihood that the jury would
27 not apply the presumption of innocence and would convict McConnell based on a lesser
28

1 standard of proof than is constitutionally required. Second Amended Petition (ECF No.
2 95), pp. 229, 234–35.

3 Respondents concede, and the Court finds, that Claim 8D of McConnell's second
4 amended habeas petition relates back to Claim 8D of his first amended petition, and
5 that, therefore, Claim 8D is not barred by the statute of limitations. See Motion to
6 Dismiss (ECF No. 122), p. 12; Reply (ECF No. 145), p. 19; *see also* First Amended
7 Petition (ECF No. 24), pp. 145, 148–49. The Court will deny Respondents' motion to
8 dismiss Claim 8D on statute of limitations grounds.

9 Respondents argue that Claim 8D is procedurally defaulted. See Motion to
10 Dismiss (ECF No. 122), pp. 25–26; Reply (ECF No. 145), p. 40. The Court agrees.
11 McConnell first made a claim such as that in Claim 8D in his second state habeas
12 petition. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 150,
13 153–54 (ECF No. 96-1, pp. 151, 154–55). The Nevada Supreme Court ruled
14 McConnell's entire second state habeas petition to be procedurally barred under Nev.
15 Rev. Stat. §§ 34.726 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-4).
16 The Court determines that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate to
17 support application of the procedural default doctrine. See Part III.C.2., *supra*. The
18 Court also determines that the Nevada Supreme Court's application of Nev. Rev. Stat.
19 §§ 34.726 and 34.810 was independent of federal law. See Part III.C.3., *supra*.
20 McConnell does not make any showing of cause and prejudice relative to the
21 procedural default of this claim, or any other showing that excuses the procedural
22 default. The Court will grant Respondents' motion to dismiss Claim 8D on procedural
23 default grounds.

24 23. Claim 9

25 In Claim 9, McConnell claims that his death sentence is unconstitutional because
26 of prosecutorial misconduct. Second Amended Petition (ECF No. 95), pp. 236–40.

27 Respondents concede, and the Court finds, that Claim 9 of McConnell's second
28 amended habeas petition relates back to Claim 9 of his first amended petition, and that,

1 therefore, Claim 9 is not barred by the statute of limitations. See Motion to Dismiss
 2 (ECF No. 122), pp. 12–13; Reply (ECF No. 145), p. 19; see *a/so* First Amended Petition
 3 (ECF No. 24), pp. 150–53. The Court will deny Respondents’ motion to dismiss Claim 9
 4 on statute of limitations grounds.

5 Respondents argue that Claim 9 is procedurally defaulted in part. See Motion to
 6 Dismiss (ECF No. 122), p. 26; Reply (ECF No. 145), p. 40. The Court agrees.

7 McConnell asserted a claim of prosecutorial misconduct on his direct appeal, but that
 8 claim was less extensive than Claim 9 in this case. See Appellant’s Opening Brief, Exh.
 9 1, pp. 33–42 (ECF No. 25-2, pp. 39–48). Comparing Claim 9 in this case to the claims
 10 of prosecutorial misconduct made by McConnell on his direct appeal, the Court
 11 determines that McConnell bases Claim 9, in part, on the following arguments allegedly
 12 made by the prosecution, but he did not include these in his prosecutorial misconduct
 13 claims on direct appeal:

- 14 - “When you cast a play in hell....” Second Amended Petition
 15 (ECF No. 95), p. 236, lines 14–20.
- 16 - “[T]hink of April ... ‘April, I know your dad just lost your mom. I won’t
 17 kill you.’” *Id.*, p. 238, lines 1–4.
- 18 - “What do I agree with that [McConnell] said? Brian was a good
 man.” *Id.*, p. 238, lines 10–12.

19 See Appellant’s Opening Brief, Exh. 1, pp. 33–42 (ECF No. 25-2, pp. 39–48). On
 20 McConnell’s direct appeal, the Nevada Supreme Court ruled on his prosecutorial
 21 misconduct claims on their merits. See *McConnell*, 120 Nev. at 1057–61, 102 P.3d at
 22 616–19. In his second state habeas action, McConnell made a claim like that in Claim 9
 23 in this case, and included the three allegations described above that were not asserted
 24 on his direct appeal. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh.
 25 493, pp. 155–58 (ECF No. 96-1, pp. 156–59). However, the Nevada Supreme Court
 26 ruled McConnell’s entire second state habeas petition to be procedurally barred under
 27 Nev. Rev. Stat. §§ 34.726 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-
 28 4). The Court determines that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate

1 to support application of the procedural default doctrine. See Part III.C.2., *supra*. The
 2 Court also determines that the Nevada Supreme Court's application of Nev. Rev. Stat.
 3 §§ 34.726 and 34.810 was independent of federal law. See Part III.C.3., *supra*.
 4 McConnell does not make any showing of cause and prejudice relative to the
 5 procedural default of part of this claim, or any other showing that excuses the
 6 procedural default. The Court will grant Respondents' motion to dismiss Claim 9, on
 7 procedural default grounds, with respect to the following comments of the prosecutor
 8 alleged by McConnell to have been prosecutorial misconduct:

- 9 - "When you cast a play in hell...." Second Amended Petition
 10 (ECF No. 95), p. 236, lines 14–20.
- 11 - "[T]hink of April ... 'April, I know your dad just lost your mom. I won't
 12 kill you.'" *Id.*, p. 238, lines 1–4.
- 13 - "What do I agree with that [McConnell] said? Brian was a good
 14 man." *Id.*, p. 238, lines 10–12.

15 24. Claim 10

16 In Claim 10, McConnell claims that his death sentence is unconstitutional
 17 because the trial court erroneously allowed the prosecution to introduce unduly
 18 prejudicial, lengthy, and irrelevant victim impact statements. Second Amended Petition
 19 (ECF No. 95), pp. 241–44.

20 Respondents concede, and the Court finds, that Claim 10 of McConnell's second
 21 amended habeas petition relates back to Claim 10 of his first amended petition, and
 22 that, therefore, Claim 10 is not barred by the statute of limitations. See Motion to
 23 Dismiss (ECF No. 122), p. 13; Reply (ECF No. 145), p. 19; *see also* First Amended
 24 Petition (ECF No. 24), pp. 154–56. The Court will deny Respondents' motion to dismiss
 25 Claim 10 on statute of limitations grounds.

26 Respondents do not argue that Claim 10 is procedurally defaulted.
 27
 28

1 25. *Claim 11*

2 In Claim 11, McConnell claims that his death sentence is unconstitutional
3 because he was given inadequate notice of the prosecution's case in aggravation.
4 Second Amended Petition (ECF No. 95), pp. 245–48.

5 Respondents concede, and the Court finds, that Claim 11 of McConnell's second
6 amended habeas petition relates back to Claim 11 of his first amended petition, and
7 that, therefore, Claim 11 is not barred by the statute of limitations. See Motion to
8 Dismiss (ECF No. 122), pp. 13–14; Reply (ECF No. 145), p. 19; *see also* First Amended
9 Petition (ECF No. 24), pp. 157–59. The Court will deny Respondents' motion to dismiss
10 Claim 11 on statute of limitations grounds.

11 Respondents do not argue that Claim 11 is procedurally defaulted.

12 26. *Claim 12*

13 In Claim 12, McConnell claims that his death sentence is unconstitutional
14 because the trial court failed to bifurcate the penalty hearing. Second Amended Petition
15 (ECF No. 95), pp. 249–53.

16 Respondents concede, and the Court finds, that Claim 12 of McConnell's second
17 amended habeas petition relates back to Claim 12 of his first amended petition, and
18 that, therefore, Claim 12 is not barred by the statute of limitations. See Motion to
19 Dismiss (ECF No. 122), p. 14; Reply (ECF No. 145), p. 19; *see also* First Amended
20 Petition (ECF No. 24), pp. 160–63. The Court will deny Respondents' motion to dismiss
21 Claim 12 on statute of limitations grounds.

22 Respondents do not argue that Claim 12 is procedurally defaulted.

23 27. *Claim 13*

24 In Claim 13, McConnell claims that his death sentence is unconstitutional
25 because of errors committed by the trial court and the prosecution in systemically
26 removing all death scrupled jurors from the venire. Second Amended Petition (ECF No.
27 95), pp. 254–58.

1 Respondents concede, and the Court finds, that Claim 13 of McConnell's second
2 amended habeas petition relates back to Claim 13 of his first amended petition, and
3 that, therefore, Claim 13 is not barred by the statute of limitations. See Motion to
4 Dismiss (ECF No. 122), p. 14; Reply (ECF No. 145), p. 19; see *also* First Amended
5 Petition (ECF No. 24), pp. 164–66. The Court will deny Respondents' motion to dismiss
6 Claim 13 on statute of limitations grounds.

7 Respondents argue that Claim 13 is procedurally defaulted. See Motion to
8 Dismiss (ECF No. 122), pp. 26–27; Reply (ECF No. 145), p. 41. McConnell asserted a
9 claim such as that in Claim 13, regarding some of the alleged death scrupled jurors, on
10 the appeal in his first state habeas petition. See Appellant's Opening Brief, Exh. 6, pp.
11 18–20 (ECF No. 25-6, ECF No. 25-7, pp.38–40). The Nevada Supreme Court affirmed
12 the dismissal of this claim under Nev. Rev. Stat. § 34.810, ruling that the claim should
13 have been raised on direct appeal. *McConnell*, 125 Nev. at 258, 212 P.3d at 317.
14 McConnell subsequently asserted the claim, regarding all the alleged death scrupled
15 jurors, in his second state habeas petition. See Petition for Writ of Habeas Corpus
16 (Post-Conviction), Exh. 493, pp. 169–71 (ECF No. 96-1, pp. 170–73). The Nevada
17 Supreme Court ruled McConnell's entire second state habeas petition to be
18 procedurally barred under Nev. Rev. Stat. §§ 34.726 and 34.810. See Order of
19 Affirmance, Exh. 487 (ECF No. 89-4). McConnell, though, argues that he can show
20 cause and prejudice, such as to overcome any procedural default of the claim, on
21 account of ineffective assistance of his appellate counsel for not raising the claim on his
22 direct appeal. See Opposition to Motion to Dismiss (ECF No. 128), pp. 76–77.
23 Therefore, because the resolution of this issue is intertwined with the merits of this claim
24 and the merits of the related claim of ineffective assistance of appellate counsel, the
25 Court will deny the motion to dismiss Claim 13 on procedural default grounds, without
26 prejudice to Respondents asserting the procedural default defense to Claim 13 their
27 answer.
28

1 28. *Claim 14*

2 In Claim 14, McConnell claims that his death sentence is unconstitutional
3 because of jury misconduct. Second Amended Petition (ECF No. 95), pp. 259–61.

4 Respondents concede, and the Court finds, that Claim 14 of McConnell's second
5 amended habeas petition relates back to Claim 14 of his first amended petition, and
6 that, therefore, Claim 14 is not barred by the statute of limitations. See Motion to
7 Dismiss (ECF No. 122), pp. 14–15; Reply (ECF No. 145), p. 19; *see also* First Amended
8 Petition (ECF No. 24), pp. 167–68. The Court will deny Respondents' motion to dismiss
9 Claim 14 on statute of limitations grounds.

10 Respondents argue that Claim 14 is procedurally defaulted. See Motion to
11 Dismiss (ECF No. 122), p. 27; Reply (ECF No. 145), p. 41. The Court agrees.
12 McConnell first made a claim such as that in Claim 14 in his second state habeas
13 petition. See Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493, pp. 172–
14 73 (ECF No. 96-1, pp. 173–74). The Nevada Supreme Court ruled McConnell's entire
15 second state habeas petition to be procedurally barred under Nev. Rev. Stat. §§ 34.726
16 and 34.810. See Order of Affirmance, Exh. 487 (ECF No. 89-4). The Court determines
17 that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate to support application of
18 the procedural default doctrine. See Part III.C.2., *supra*. The Court also determines that
19 the Nevada Supreme Court's application of Nev. Rev. Stat. §§ 34.726 and 34.810 was
20 independent of federal law. See Part III.C.3., *supra*. McConnell does not make any
21 showing of cause and prejudice relative to the procedural default of this claim, or any
22 other showing that excuses the procedural default. The Court will grant Respondents'
23 motion to dismiss Claim 14 on procedural default grounds.

24 29. *Claim 15A*

25 In Claim 15A, McConnell claims that his conviction and death sentence are
26 unconstitutional because the Nevada Supreme Court's automatic review of capital
27 sentences is inadequate. Second Amended Petition (ECF No. 95), pp. 262–64.

1 Respondents concede, and the Court finds, that Claim 15A of McConnell's
2 second amended habeas petition relates back to Claim 15A of his first amended
3 petition, and that, therefore, Claim 15A is not barred by the statute of limitations. See
4 Motion to Dismiss (ECF No. 122), p. 15; Reply (ECF No. 145), p. 19; see *a/so* First
5 Amended Petition (ECF No. 24), pp. 169–70. The Court will deny Respondents' motion
6 to dismiss Claim 15A on statute of limitations grounds.

7 Respondents argue that Claim 15A is procedurally defaulted. See Motion to
8 Dismiss (ECF No. 122), p. 27; Reply (ECF No. 145), pp. 41–42. In response, McConnell
9 argues that he can show cause and prejudice, such as to overcome any procedural
10 default of the claim, on account of ineffective assistance of his appellate counsel for not
11 raising the claim on his direct appeal. See Opposition to Motion to Dismiss (ECF No.
12 128), pp. 77–78. In their reply, Respondents acknowledge this argument by McConnell
13 and state that, “because McConnell claims he can overcome his defaults by showing
14 appellate counsel was ineffective for failing to raise them on appeal, this Court should
15 defer ruling on dismissal of Claim Fifteen until Respondents have had a chance to
16 address the related ineffective assistance of appellate counsel claims from Claim
17 Sixteen on the merits in an answer.” Reply (ECF No. 145), pp. 41–42. The Court agrees
18 with this approach. The Court will deny the motion to dismiss Claim 15A on procedural
19 default grounds, without prejudice to Respondents asserting the procedural default
20 defense to Claim 15A in their answer.

21 *30. Claim 15B*

22 In Claim 15B, McConnell claims that his conviction and death sentence are
23 unconstitutional because his *Faretta* hearing, plea hearing, sentencing, and review on
24 direct appeal were conducted before elected officials. Second Amended Petition (ECF
25 No. 95), pp. 262, 264–68.

26 Respondents concede, and the Court finds, that Claim 15B of McConnell's
27 second amended habeas petition relates back to Claim 15B of his first amended
28 petition, and that, therefore, Claim 15B is not barred by the statute of limitations. See

1 Motion to Dismiss (ECF No. 122), p. 15; Reply (ECF No. 145), p. 19; *see also* First
2 Amended Petition (ECF No. 24), pp. 170–73. The Court will deny Respondents’ motion
3 to dismiss Claim 15B on statute of limitations grounds.

4 Respondents argue that Claim 15B is procedurally defaulted. *See* Motion to
5 Dismiss (ECF No. 122), p. 27; Reply (ECF No. 145), pp. 41–42. In response, McConnell
6 argues that he can show cause and prejudice, such as to overcome any procedural
7 default of the claim, on account of ineffective assistance of his appellate counsel for not
8 raising the claim on his direct appeal. *See* Opposition to Motion to Dismiss (ECF No.
9 128), p. 79. In their reply, here again, Respondents acknowledge this argument by
10 McConnell and state that, “because McConnell claims he can overcome his defaults by
11 showing appellate counsel was ineffective for failing to raise them on appeal, this Court
12 should defer ruling on dismissal of Claim Fifteen until Respondents have had a chance
13 to address the related ineffective assistance of appellate counsel claims from Claim
14 Sixteen on the merits in an answer.” Reply (ECF No. 145), pp. 41–42. The Court agrees
15 with this approach. The Court will deny the motion to dismiss Claim 15B on procedural
16 default grounds, without prejudice to Respondents asserting the procedural default
17 defense to Claim 15B in their answer.

18 *31. Claim 16*

19 In Claim 16, McConnell claims that his conviction and death sentence are
20 unconstitutional because of ineffective assistance of his appellate counsel because his
21 appellate counsel was subject to conflicts of interest and failed to raise issues on
22 appeal. Second Amended Petition (ECF No. 95), pp. 269–80.

23 Respondents argue that Claim 16 is, in part, barred by the statute of limitations.
24 *See* Motion to Dismiss (ECF No. 122), pp. 15–16; Reply (ECF No. 145), p. 20.
25 Specifically, Respondents argue that in Claim 16 of his first amended petition
26 McConnell alleged only the conflict of interest caused by the Washoe County Public
27 Defender’s (“WCPD’s”) prior representation of April Robinson and a confidential
28 informant, whereas in his second amended petition he alleges both that conflict and

1 another conflict, the second being a conflict caused by the WCPD's representation of
2 McConnell both before the trial court and the appellate court. In his second amended
3 petition, McConnell claims that, because of the two conflicts of interest, his appellate
4 counsel did not raise the claims asserted in Claims 1, 2 and 7. Those claims, though,
5 are related to the WCPD's alleged conflict caused by prior representation of Robinson
6 and the informant. The Court determines that, with respect to the prejudice McConnell
7 alleges resulting from the WCPD's conflicts of interest, Claim 16 cannot be parsed in
8 the manner suggested by Respondents. In other words, Claim 16 in the second
9 amended petition, to the extent based on conflicts of interest of the WCPD, arises from
10 the same core operative facts—including the failure to raise on appeal the claims in
11 Claims 1, 2 and 7—as the claims in Claim 16 in the first amended petition. The Court
12 determines that Claim 16 in the second amended petition, in its entirety, relates back to
13 Claim 16 in the first amended petition and is not barred by the statute of limitations. The
14 Court will deny Respondents' motion to dismiss Claim 16 on statute of limitations
15 grounds.

16 Respondents argue that Claim 16 is, in part, procedurally defaulted. See Motion
17 to Dismiss (ECF No. 122), pp. 27–28; Reply (ECF No. 145), pp. 42–43. Here,
18 Respondents point out that McConnell did not, prior to his second state habeas petition,
19 claim in state court that his appellate counsel was ineffective for failing to assert the
20 claims in Claims 2, 4, 8B, 8C and 8D, and he argues that, therefore, Claim 16 is
21 procedurally defaulted to the extent of those claims. See *id.*; see also Petition for Writ of
22 Habeas Corpus, Exh. 5 (ECF No. 106-5); Supplement to Petition for Writ of Habeas
23 Corpus (Post-Conviction), Exh. 10 (ECF No. 106-10); Petition for Writ of Habeas
24 Corpus (Post-Conviction), Exh. 493 (ECF No. 96-1). This argument is well taken.
25 McConnell's claims that his appellate counsel was ineffective for failing to assert, on his
26 direct appeal, the claims in Claims 2, 4, 8B, 8C and 8D, were first asserted in
27 McConnell's second state habeas petition and were ruled procedurally barred under
28 Nev. Rev. Stat. §§ 34.726 and 34.810 in that case. See Order of Affirmance, Exh. 487

(ECF No. 89-4). The Court determines that Nev. Rev. Stat. §§ 34.726 and 34.810 are both adequate to support application of the procedural default doctrine. See Part III.C.2., *supra*. The Court also determines that the Nevada Supreme Court's application of Nev. Rev. Stat. §§ 34.726 and 34.810 was independent of federal law. See Part III.C.3., *supra*. McConnell does not make any showing of cause and prejudice relative to the procedural default of these claims, or any other showing that excuses these procedural defaults. The Court will grant Respondents' motion to dismiss Claim 16, on procedural default grounds, to the extent that McConnell claims that his appellate counsel was ineffective for failing to assert, on his direct appeal, the claims in Claims 2, 4, 8B, 8C and 8D.

32. *Claim 17*

In Claim 17, McConnell claims that his federal constitutional rights were violated because of the cumulative effect of the errors described in his second amended petition. Second Amended Petition (ECF No. 95), p. 281. This cumulative error claim is procedurally viable—not barred by the statute of limitations and not procedurally defaulted—because there are underlying claims in McConnell's second amended petition that are not dismissed in this order. The Court will deny the motion to dismiss with respect to Claim 17.

33. *Claim 18A1*

In Claim 18A1, McConnell claims that his death sentence is unconstitutional because execution by lethal injection is unconstitutional in all circumstances. Second Amended Petition (ECF No. 95), pp. 282–92.

Respondents concede, and the Court finds, that Claim 18A1 of McConnell's second amended habeas petition relates back to Claim 18 of his first amended petition, and that, therefore, Claim 18A1 is not barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 17; Reply (ECF No. 145), p. 21; *see also* First Amended Petition (ECF No. 24), pp. 177–91. The Court will deny Respondents' motion to dismiss Claim 18A1 on statute of limitations grounds.

1 Respondents argue that Claim 18A1 is procedurally defaulted. See Motion to
2 Dismiss (ECF No. 122), p. 29; Reply (ECF No. 145), pp. 44–45. The Court agrees.
3 McConnell has never made a claim in state court that lethal injection is unconstitutional
4 in all circumstances. See Appellant’s Opening Brief, Exh. 1 (ECF No. 25-2); Petition for
5 Writ of Habeas Corpus, Exh. 5 (ECF No. 106-5); Supplement to Petition for Writ of
6 Habeas Corpus (Post-Conviction), Exh. 10 (ECF No. 106-10); Appellant’s Opening
7 Brief, Exh. 6 (ECF No. 25-6, ECF No. 25-7, pp. 1–28); Petition for Writ of Habeas
8 Corpus (Post-Conviction), Exh. 493 (ECF No. 96-1); Appellant’s Opening Brief, Exh.
9 484 (ECF No. 89-1). The Court determines, then, that this claim is unexhausted, but
10 that if McConnell were to return to state court to exhaust the claim it would be ruled
11 procedurally barred. See Part III.B.2., *supra*. Therefore, the anticipatory default doctrine
12 applies, and the Court considers this claim to be technically exhausted but procedurally
13 defaulted. See *Dickens*, 740 F.3d at 1317. McConnell makes no showing to overcome
14 this procedural default. The Court will grant Respondents’ motion to dismiss Claim 18A1
15 on procedural default grounds.

16 **34. Claim 18A2**

17 In Claim 18A2, McConnell claims that his death sentence is unconstitutional
18 because execution by lethal injection as it would be carried out in Nevada is
19 unconstitutional. Second Amended Petition (ECF No. 95), pp. 282, 292–301.

20 Respondents argue that this claim is time-barred, unexhausted in state court,
21 and not ripe. See Motion to Dismiss (ECF No. 122), pp. 17, 30–31; Reply (ECF No.
22 145), pp. 21, 44, 47. Respondents raise serious questions about the procedural viability
23 of this claim; however, as it is unclear whether the State has yet established the
24 protocol by which McConnell’s execution would be conducted, the Court will deny
25 Respondents’ motion to dismiss Claim 18A2 and will leave these questions, and any
26 other issues concerning the claim, to be determined after Respondents file an answer
27 and McConnell a reply. The denial of the motion to dismiss this claim is without
28

1 prejudice to Respondents raising the same arguments regarding the claim in their
2 answer.

3 35. *Claim 18B*

4 In Claim 18B, McConnell claims that his death sentence is unconstitutional
5 because Nevada's death-penalty scheme does not narrow the class of persons eligible
6 for the death penalty. Second Amended Petition (ECF No. 95), pp. 282, 301–02.

7 Respondents argue that Claim 18B is barred by the statute of limitations. See
8 Motion to Dismiss (ECF No. 122), p. 17; Reply (ECF No. 145), p. 21. The Court
9 disagrees. Claim 18B of McConnell's second amended petition shares a common core
10 of operative fact with Claim 19 in McConnell's original petition. See Petition for Writ of
11 Habeas Corpus (ECF No. 1), pp. 136–42. Claim 18B therefore relates back to
12 McConnell's original petition and is not barred by the statute of limitations. The Court will
13 deny Respondents' motion to dismiss Claim 18B on statute of limitations grounds.

14 Respondents argue that Claim 18B is procedurally defaulted. See Motion to
15 Dismiss (ECF No. 122), p. 29; Reply (ECF No. 145), p. 45. Here again, the Court
16 disagrees. McConnell asserted such a claim on his direct appeal. See Appellant's
17 Opening Brief, Exh. 1, pp. 46–47 (ECF No. 25-2, pp. 52–53). The Court will deny
18 Respondents' motion to dismiss Claim 18B on procedural default grounds.

19 36. *Claim 18C*

20 In Claim 18C, McConnell claims that the death penalty is unconstitutional.
21 Second Amended Petition (ECF No. 95), pp. 282, 303–04.

22 Respondents argue that Claim 18C is barred by the statute of limitations. See
23 Motion to Dismiss (ECF No. 122), p. 17; Reply (ECF No. 145), p. 21. The Court
24 disagrees. Claim 18C of McConnell's second amended petition shares a common core
25 of operative fact with Claim 18 in McConnell's original petition. See Petition for Writ of
26 Habeas Corpus (ECF No. 1), pp. 122–34. Claim 18C therefore relates back to
27 McConnell's original petition and is not barred by the statute of limitations. The Court will
28 deny Respondents' motion to dismiss Claim 18C on statute of limitations grounds.

1 Respondents argue that Claim 18C is procedurally defaulted. See Motion to
2 Dismiss (ECF No. 122), pp. 29–30; Reply (ECF No. 145), p. 45. The Court agrees.
3 McConnell did not assert this claim on his direct appeal. See Appellant’s Opening Brief,
4 Exh. 1 (ECF No. 25-2). McConnell did assert such a claim in his first state habeas
5 action (see Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exh.
6 10, pp. 34–73 (ECF No. 106-10, pp. 35–74)), but the Nevada Supreme Court ruled the
7 claim to be procedurally barred under Nev. Rev. Stat. § 34.810 because it was not
8 raised on direct appeal. *McConnell*, 125 Nev. at 258, 212 P.3d at 317. The Court
9 determines that Nev. Rev. Stat. § 34.810 is adequate to support application of the
10 procedural default doctrine. See Part III.C.2., *supra*. The Court also determines that the
11 Nevada Supreme Court’s application of Nev. Rev. Stat. § 34.810 was independent of
12 federal law. McConnell does not make any showing of cause and prejudice relative to
13 the procedural default of this claim, or any other showing that excuses the procedural
14 default. The Court will grant Respondents’ motion to dismiss Claim 18C on procedural
15 default grounds.

16 37. *Claim 18D*

17 In Claim 18D, McConnell claims that Nevada’s death-penalty scheme is
18 unconstitutional because executive clemency is unavailable. Second Amended Petition
19 (ECF No. 95), pp. 282, 304–05.

20 Respondents concede, and the Court finds, that Claim 18D of McConnell’s
21 second amended habeas petition relates back to Claim 18 of his first amended petition,
22 and that, therefore, Claim 18D is not barred by the statute of limitations. See Motion to
23 Dismiss (ECF No. 122), pp. 17–18; Reply (ECF No. 145), p. 22; *see also* First Amended
24 Petition (ECF No. 24), pp. 177–91. The Court will deny Respondents’ motion to dismiss
25 Claim 18D on statute of limitations grounds.

26 Respondents argue that Claim 18D is procedurally defaulted. See Motion to
27 Dismiss (ECF No. 122), pp. 29–30; Reply (ECF No. 145), pp. 45–46. The Court agrees.
28 McConnell has never made a claim in state court that executive clemency is

unavailable. See Appellant's Opening Brief, Exh. 1 (ECF No. 25-2); Petition for Writ of Habeas Corpus, Exh. 5 (ECF No. 106-5); Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 10 (ECF No. 106-10); Appellant's Opening Brief, Exh. 6 (ECF No. 25-6, ECF No. 25-7, pp. 1–28); Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493 (ECF No. 96-1); Appellant's Opening Brief, Exh. 484 (ECF No. 89-1). The Court determines, then, that this claim is unexhausted, but that if McConnell were to return to state court to exhaust the claim it would be ruled procedurally barred. See Part III.B.2., *supra*. Therefore, the anticipatory default doctrine applies, and the Court considers this claim to be technically exhausted but procedurally defaulted. See *Dickens*, 740 F.3d at 1317. The Court will grant Respondents' motion to dismiss Claim 18D on procedural default grounds.

38. Claim 18E

In Claim 18E, McConnell claims that Nevada's death-penalty scheme operates in an unconstitutionally arbitrary and capricious manner. Second Amended Petition (ECF No. 95), pp. 282, 305. This claim is essentially the same as Claim 18B, albeit with less detail. The Court will deny Respondents' motion to dismiss this claim for the same reasons it denies Respondents' motion to dismiss Claim 18B. See Part III.D.35., *supra*.

39. Claim 18F

In Claim 18F, McConnell claims that his convictions and death sentence are unconstitutional because his trial and appellate counsel were ineffective for failing to assert the claims in Claims 18A, 18B, 18C, 18D and 18E. Second Amended Petition (ECF No. 95), pp. 282, 305.

Respondents argue that Claim 18F is barred by the statute of limitations. See Motion to Dismiss (ECF No. 122), p. 18; Reply (ECF No. 145), p. 22. The Court agrees with respect to parts of Claim 18F. The Court finds that all of the substantive claims in Claims 18A1, 18A2, 18B, 18C, 18D and 18E were asserted in either McConnell's original petition or his first amended petition, or both. See Parts III.D.33., III.D.35., III.D.36, III.D.37., III.D.38., *supra*; see also Petition for Writ of Habeas Corpus (ECF No.

1 1), pp. 69–81, 122–34; 136–42; First Amended Petition (ECF No. 24), pp. 177–91.
2 However, in his original and first amended petitions, it was only as to some of those
3 substantive claims that McConnell asserted ineffective assistance of his trial or
4 appellate counsel for failure to raise the claims. In his original petition, McConnell
5 claimed ineffective assistance of trial counsel with respect to the claim in Claim 18A2
6 (the claim that execution by lethal injection as it would be carried out in Nevada is
7 unconstitutional). See Petition for Writ of Habeas Corpus (ECF No. 1), p. 81. Also in his
8 original petition, McConnell claimed ineffective assistance of appellate counsel with
9 respect to the claims in Claims 18A2, 18B (the claim that Nevada’s death-penalty
10 scheme does not narrow the class of persons eligible for the death penalty), 18C (the
11 claim that the death penalty is unconstitutional), and 18E (another claim that Nevada’s
12 death-penalty scheme does not narrow the class of persons eligible for the death
13 penalty). See Petition for Writ of Habeas Corpus (ECF No. 1), p. 157. In his first
14 amended petition, McConnell did not claim ineffective assistance of either trial or
15 appellate counsel regarding any of the claims in Claims 18A1, 18A2, 18B, 18C, 18D
16 and 18E. See First Amended Petition (ECF No. 24). Therefore, with respect to the
17 claims of ineffective assistance of trial counsel regarding Claim 18A2 and ineffective
18 assistance of appellate counsel regarding Claims 18A2, 18B, 18C and 18E, the Court
19 finds that McConnell’s claims in 18F relate back to his original petition and are not
20 barred by the statute of limitations; the remainder of the claims in Claim 18F do not
21 relate back and are barred by the statute of limitations, and the motion to dismiss will be
22 granted as to those claims on statute of limitations grounds.

23 Respondents argue that Claim 18F is procedurally defaulted. See Motion to
24 Dismiss (ECF No. 122), p. 30; Reply (ECF No. 145), pp. 45–46. The Court agrees with
25 respect to all but one claim in Claim 18F. Other than the claim of ineffective assistance
26 of appellate counsel for not raising Claim 18C on his direct appeal, McConnell has
27 never made any of the claims of ineffective assistance of counsel in Claim 18F in state
28 court. See Appellant’s Opening Brief, Exh. 1 (ECF No. 25-2); Petition for Writ of Habeas

Corpus, Exh. 5 (ECF No. 106-5); Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 10 (ECF No. 106-10); Appellant's Opening Brief, Exh. 6 (ECF No. 25-6, ECF No. 25-7, pp. 1–28); Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 493 (ECF No. 96-1); Appellant's Opening Brief, Exh. 484 (ECF No. 89-1). In his first state habeas action, McConnell asserted a claim that his appellate counsel was ineffective for not raising the claim in Claim 18C (the claim that the death penalty is unconstitutional) on his direct appeal (see Supplement to Petition for Writ of Habeas Corpus (Post-Conviction), Exh. 10, pp. 34–73, 113 (ECF No. 106-10, pp. 35–74, 114)), and the Nevada Supreme Court appears to have affirmed the denial of relief on that claim without discussion. See *McConnell*, 125 Nev. 243, 212 P.3d 307. The remainder of the claims in Claim 18F are unexhausted in state court. The Court determines, though, that if McConnell were to return to state court to exhaust those claims they would be ruled procedurally barred. See Part III.B.2., *supra*. Therefore, the anticipatory default doctrine applies, and the Court considers the claims in Claim 18F, with the exception of the claim of ineffective assistance of appellate counsel with respect to Claim 18C, to be technically exhausted but procedurally defaulted (see *Dickens*, 740 F.3d at 1317), and the Court will grant the motion to dismiss Claim 18F on procedural default grounds to that extent.

So, summarizing the Court's rulings regarding Claim 18F:

- the claim of ineffective assistance of trial counsel, regarding Claim 18A1 is dismissed on both statute of limitations and procedural default grounds;
- the claim of ineffective assistance of trial counsel, regarding Claim 18A2 is dismissed on procedural default grounds;
- the claim of ineffective assistance of trial counsel, regarding Claim 18B is dismissed on both statute of limitations and procedural default grounds;
- the claim of ineffective assistance of trial counsel, regarding Claim 18C is dismissed on both statute of limitations and procedural default grounds;

- the claim of ineffective assistance of trial counsel, regarding Claim 18D is dismissed on both statute of limitations and procedural default grounds;
- the claim of ineffective assistance of trial counsel, regarding Claim 18E is dismissed on both statute of limitations and procedural default grounds;
- the claim of ineffective assistance of appellate counsel, regarding Claim 18A1 is dismissed on both statute of limitations and procedural default grounds;
- the claim of ineffective assistance of appellate counsel, regarding Claim 18A2 is dismissed on procedural default grounds;
- the claim of ineffective assistance of appellate counsel, regarding Claim 18B is dismissed on procedural default grounds;
- the motion to dismiss the claim of ineffective assistance of appellate counsel regarding Claim 18C is denied;
- the claim of ineffective assistance of appellate counsel, regarding Claim 18D is dismissed on both statute of limitations and procedural default grounds;
- the claim of ineffective assistance of appellate counsel, regarding Claim 18E is dismissed on procedural default grounds.

E. Motion for Evidentiary Hearing

In his motion for evidentiary hearing (ECF No. 130), McConnell requests an evidentiary hearing to establish that he received ineffective assistance of his appellate and post-conviction counsel and can therefore show cause and prejudice with respect to various of his claims. See Motion for Evidentiary Hearing (ECF No. 130). However, with respect to the question whether McConnell can show cause and prejudice for any procedural default on account of ineffective assistance of his appellate or post-conviction counsel, the Court defers consideration of those issues until after the parties file an answer and reply and the merits of McConnell's claims are fully briefed. Therefore, an evidentiary hearing on those issues is unwarranted at this time. McConnell's motion for an evidentiary hearing to support his opposition to the motion to dismiss will be denied, without prejudice. McConnell may file a new motion for an evidentiary hearing, if factually and legally justified, in conjunction with his reply to

1 Respondents' answer, as contemplated in the scheduling order entered December 4,
2 2019 (ECF No. 91).

3 **IV. CONCLUSION**

4 **IT IS THEREFORE ORDERED** that Respondents' Motion to Dismiss (ECF No.
5 122) is **GRANTED IN PART AND DENIED IN PART**. The following claims in
6 Petitioner's second amended habeas petition are dismissed:

- 7 - Claim 2A;
- 8 - Claim 2C;
- 9 - Claim 2D;
- 10 - Claim 2E;
- 11 - Claim 2F;
- 12 - Claim 2G;
- 13 - Claim 4;
- 14 - Claim 7;
- 15 - Claim 8B;
- 16 - Claim 8C;
- 17 - Claim 8D;
- 18 - Claim 9, to the extent the claim is based on the following comments
19 alleged by McConnell to have been prosecutorial misconduct:
 - 20 - "When you cast a play in hell...." Second Amended
Petition (ECF No. 95), p. 236, lines 14–20;
 - 21 - "[T]hink of April ... 'April, I know your dad just lost
22 your mom. I won't kill you.'" *Id.*, p. 238, lines 1–4; and
 - 23 - "What do I agree with that [McConnell] said? Brian
was a good man." *Id.*, p. 238, lines 10–12;
- 24 - Claim 14;
- 25 - Claim 16, to the extent that McConnell claims that his appellate
26 counsel was ineffective for failing to assert, on his direct appeal,
the claims in Claims 2, 4, 8B, 8C and 8D;
- 27 - Claim 18A1;
- 28 - Claim 18C;

- Claim 18D;
- Claim 18F, except the claim that McConnell's appellate counsel was ineffective for not raising the claim in Claim 18C on his direct appeal.

In all other respects, the motion to dismiss is denied.

IT IS FURTHER ORDERED that Petitioner's Motion for Evidentiary Hearing (ECF No. 130) is **DENIED**.

IT IS FURTHER ORDERED that Respondents shall, within 180 days from the date of this order, file an answer, responding to the remaining claims in Petitioner's Second Amended Petition for Writ of Habeas Corpus (ECF No. 95). The time for Petitioner to file a reply to Respondents' answer, as set forth in the December 4, 2019, scheduling order (ECF No. 91), will be extended to 120 days. In all other respects, the schedule for further proceedings set forth in the December 4, 2019, scheduling order (ECF No. 91) will remain in effect.

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 25(d), William Reubart is substituted for William Gittere as the respondent warden. The Clerk of the Court is directed to update the docket to reflect this change.

DATED THIS 24 day of July, 2022.



GLORIA M. NAVARRO
UNITED STATES DISTRICT JUDGE